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In the Supreme Court of the

United States

OCTOBER TERM, 1976

No. 76-90

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION
ASSOCIATION, AND FRANK TEMOKE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, AND THE WESTERN
SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE
TEMOAK BANDS OF WESTERN SHOSHONE INDIANS,
NEVADA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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Petitioners, Western Shoshone Legal Defense and
Education Association and Frank Temoke, petitioners
to stay proceedings and appellants in the courts below,
pray that a Writ of Certiorari issue to review the judg-
ment of the United States Court of Claims herein.

OPINIONS BELOW

The opinion of the Indian Claims Commission dis-

missing the Petition to stay proceedings and for leave to present an amended claim is reported at 35 Ind. Cl. Comm. 457, and is set forth at page 1a of the Appendix to this Petition. The opinion of the United States Court of Claims affirming the decision of the Indian Claims Commission, decided February 18, 1976, is reproduced at page 28a of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1976. A timely motion for rehearing was denied on April 23, 1976. The jurisdiction of this Court is invoked under the provisions of Title 23 U.S.C. §1225(1). The time for filing this Petition expires July 22, 1976.

QUESTIONS PRESENTED

1. Whether the Constitutional requirements of due process are met when interested Indian beneficiaries who are not members of the representative organization conducting litigation in their behalf, and do not agree with factual contentions which are advanced in their behalf and which are adverse to their property interests, are not afforded notice and an opportunity to be heard and present evidence?

2. Whether the due process requirements of notice and an opportunity to be heard may be limited by provisions of the Indian Claims Commission Act requiring a showing of "collusion" as a prerequisite to notice and hearing?

¹Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

3. Whether present possessory and treaty rights of native Americans to real property can be barred by laches, first, within the concepts of sovereign immunity and the wardship relationship and, second, where the "delay" cited is 23 years of efforts by claims counsel to achieve a different result than desired by the Indian beneficiaries?

STATUTES INVOLVED

Pertinent provisions of Sections 10, 17 and 22 of the Indian Claims Commission Act, respectively, are as follows:

25 U.S.C. §70(i)

Presentation of Claims. Any claims within the provisions of this Act may be presented to the Commission by any members of an Indian tribe, band or other identifiable group of Indians, as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission.

25 U.S.C. §70(p)

The Commission shall give reasonable notice to the interested parties and an opportunity to be heard and to present evidence before making any final determinations upon any claim.

25 U.S.C. §70(u)

When the report of the Commission determining any claimant to be entitled to recover has

been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT OF THE CASE

Petitioners are Western Shoshone Indians who, as members of the Western Shoshone Identifiable Group, are bound by the proceedings initiated in 1951 by the Temoak Bands of Western Shoshone Indians, on behalf of the entire anthropologically defined² Western Shoshone Identifiable Group before the Indian Claims Commission, seeking compensation for the taking of Western Shoshone lands by the United States. The Temoak Bands is an Indian Reorganization Act Corporation limited to the Western Shoshone Indians of the Elko Colony and

²Under the Indian Claims Commission Act, the claimant may be a tribe, band or "identifiable group". The latter term includes an aggregation of descendants of an Indian Band from whom the claim derives. Such a group need not have any political structure or other organization. See, e.g., *Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians*, 355 F.2d 936 (Ct. Cl. 1965).

South Fork Reservation, Nevada. The great majority of Indians constituting the remainder of the Western Shoshone Identifiable Group, and whose interests petitioners are attempting to protect, do not belong to the Temoak Bands or any other Indian Reorganization Act Corporation and reside in scattered settlements throughout their ancestral desert homeland.³

Prior to, and throughout, the claims proceedings before the Indian Claims Commission, the petitioners and their predecessors have repeatedly informed the Claims Attorney representing the Identifiable Group, agents of the United States and the Temoak Bands that they objected to the inclusion, within the claim, of approximately twelve million acres of land to which they still assert unextinguished aboriginal and treaty title.⁴

³Due to their remoteness and their willingness to concede access to those small parts of their lands which the white man thought had value in the Treaty of Ruby Valley of 1863, 18 Stat. 689 (1875), the Western Shoshone were never rounded up like most Indian tribes, but, for the most part, remained in their native valleys and clung to their traditional language, customs, religion and social organization. Petitioners alleged and made proffers of evidence below, that Petitioner Frank Temoke is a traditional chief of the Western Shoshone and that the majority of Western Shoshone people support the position of the Petitioner Association in seeking to preserve their rights not ceded in the Treaty of Ruby Valley. No one claims that these "traditional" Western Shoshone people are subject to the authority of or have any political ties with, the Temoak Bands, except by their arbitrary and unconsenting joinder in this litigation. While the United States may find it easier to do business with the English-speaking and government organized Temoak Bands Business Council, it has not claimed that the "traditional" Western Shoshone people are legally non-persons or that they do not have a right to maintain their traditional social and political organization.

⁴The validity of petitioners' substantive theory of unextinguished title is not involved in this case, since petitioners were never given the opportunity of presenting it to the Commission below and, therefore, must be taken as true for the purposes of these pro-

Despite these protests, the Temoak Bands, the Claims Attorney and the United States neither removed these lands from the claim nor made any effort to litigate the issue of whether or not present title to these lands rested with the Western Shoshone or the United States.⁵ In the event that the claim as constituted proceeds to final judgment and award, petitioners and all other members

ceedings. The Court of Claims noted that petitioners' position in this regard was not "overwhelming or clear as day" but an "open question which could be decided either way" (App. 46a). The Court of Claims simply believed that the abandonment of this claim of title to twelve million acres of ancestral lands was a decision the Representative Organization was entitled to make despite the protests of the alleged majority of owners who did not belong to the Representative Organization *Id.* (App. 46a). It should be noted that petitioners proffered to prove and submitted an affidavit by an officer of the Temoak Bands, that a decision electing remedies was never made by *any* Western Shoshone Indians, including the Temoak Bands. The Claims Attorney and agents of the United States represented to the Indians that there was no choice but to seek monetary compensation.

⁵The claim, as presented by the Temoak Bands, alleged aboriginal ownership of the lands in question and that large portions of the lands had been disposed of by the United States to settlers or others, or had been seized by the United States. The United States denied that the Western Shoshone had ever had title and in 1957, the Commission tried the issue of whether the Indians had had aboriginal title. In 1962, the Commission decided that the Indians had held aboriginal title to 24,396,403 acres in Nevada and California. Neither party alleged continuing title in the Indians to any of the land nor was any evidence produced pertaining to how the United States extinguished the Indians' title. Relying upon the representations of the parties, the Commission found that: "... the United States, without payment of compensation, acquired, controlled, or treated these lands ... as public lands from a date or dates long prior to this action to be hereinafter determined upon further proof unless the parties agree upon a date." The necessity of "further proof" regarding the taking was obviated by the parties stipulating to an "average evaluation date" of 1872. The issue of the value of all the land as of 1872 was tried in 1967 and a decision awarding the Indians \$26,550,000.00 was reached on October 10, 1972. The claim is presently awaiting decision of the issue of offsets.

of the Western Shoshone Identifiable Group will be forever barred from asserting their claim of title to these lands⁶ which will not only deprive them of their property but will destroy their culture which is based on an unusually strong religious and psychological attachment to their land.

In April, 1974, petitioners filed a Petition with the Indian Claims Commission requesting a stay of proceedings and the opportunity to amend the claim to remove the lands to which they claimed title. In order to obtain access to the tribunal in the face of the exclusive representation provisions of the Act,⁷ the Petition alleged that the United States and the Temoak Bands were acting in collusion by representing to the Commission that the United States had taken these lands when, in law and fact, they still belonged to the Western Shoshone. After the filing of responsive pleadings denying the collusion, the Commission held an oral argument limited to the issue of the definition of "collusion". The Commission denied petitioners the opportunity to present evidence in any form prior to or at that hearing.⁸

⁶Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70(u), provides that payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy. The respondent United States has sought, albeit prematurely, to use the interlocutory Commission rulings to bar members of the Petitioner Association from asserting the Western Shoshone title to some of these lands as a defense to efforts of the United States to obtain an order forbidding Indians' use of the lands. *United States v. Dann*, (U.S.D.C. Nev. R-74-60, BRT, pending).

⁷Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

⁸Petitioners repeatedly requested an evidentiary hearing to settle the contradictory factual assertions raised in the exchange of pleadings. Prior to the "oral argument on collusion", counsel for

Following the oral argument, the Petition was dismissed by the Indian Claims Commission. An appeal from that decision was taken by petitioners to the Court of Claims which affirmed the decision noting that it was "impressed by two intertwined and striking sets of facts". First, that petitioners' motion was filed twelve years after the Commission had decided the land had been taken, and second, that the petitioners were aware for a long time of the position taken by the Claims Attorney. (App. 34-35a).

Before both tribunals, petitioners argued that they were entitled to the basic notice and hearing rights required by the due process clause of the Constitution and that the notice, hearing and exclusive representation provisions of the Indian Claims Commission Act must be interpreted consistent with those rights.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS

the Commission instructed petitioners' attorney that the Commission would accept no evidence and that argument would be restricted to the definition of the term "collusion". (Transcript, Oral Argument before Indian Claims Commission, November 14, 1974, pp. 15, 56, 67-68) Throughout the decision of the Court of Claims below, that court complains of petitioners' failure to support its allegations and proffers of proof with affidavits or evidence despite the express refusal of the Commission to accept such evidence. Affidavits were attached to the briefs submitted to the Court of Claims rebutting those attached to the brief of the Claims Attorney. The Commission did not call for proffers of proof nor was there a formal opportunity for making them. Such proffers of proof as are in the record appear as answers to questions or to rebut self-serving factual statements advanced by the Claims Attorney.

CONCERNING DUE PROCESS UNDER THE EXCLUSIVE REPRESENTATION PROVISIONS OF THE INDIAN CLAIMS COMMISSION ACT.

In passing the Indian Claims Commission Act, it is apparent that Congress intended to provide a vehicle whereby Indian groups could obtain compensation and the United States obtain a release of liability for past wrongs done to the Indians by the government. However, the interpretation placed upon the exclusive representation provisions of the Act and the mode of intervention procedure imposed by the Indian Claims Commission and Court of Claims in this case, has converted the Act into another instrument capable of perpetrating new wrongs upon native Americans.⁹ The process of separating Indians from their lands by finding some unauthorized Indian willing to sell land on behalf of other Indians is ancient and was condemned by the judicial branch even in the nineteenth century. See *United States v. La Chappelle*, 81 F. 152 (1897). To reinstitute this fraudulent practice and legitimize it in the name of judicial expediency, not only perverts the Indian Claims Commission Act, but actively involves the judicial branch in what has historically been the exclusive shame and dishonor of the executive and legislative branches. This cannot be done without violating the fundamental Constitutional precepts of due process of law which protect all Americans. This

⁹The danger of abuse is further heightened by the fact that claims counsel are compensated in proportion to the size of the monetary award, 25 U.S.C. §70(n), providing incentive to such counsel to prove that as much of their clients' land as possible now belongs to the United States.

Court should issue a Writ of Certiorari to review the decisions below in order to protect the integrity of the courts of the United States, establish that the Anglo-American derived concept of due process extends across cultural as well as racial boundaries, and to reaffirm the procedural right of all Americans involved in representative actions.

In 1962, the Indian Claims Commission found that the Temoak Bands had the right to act as exclusive representative on behalf of the entire Western Shoshone Identifiable Group (App. 37a)¹⁰ and the Court of Claims in its decision below, held that petitioners must show "fraud, collusion, or laches" pursuant to Section 10 of the Act,¹¹ in order to gain independent access to the Commission (App. 37a). The wording of Section 10 seems to indicate that Congress intended a tribal organization to be the exclusive representative of the entire tribe, band or

¹⁰This finding was apparently predicated upon the approval of the Temoak Bands charter by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. §477, and the assumption that it is constitutionally permissible for the Secretary, quite arbitrarily, to bind unconsenting Indians such as petitioners to an "exclusive representative." That is so because neither the findings of the Commission nor the determination of the Secretary even purport to determine the adequacy of representation that this Court said was a necessary prerequisite to representative proceedings in *Hansberry v. Lee*, 311 U.S. 32 (1940). Moreover, the record is devoid of any evidence to support the lower courts' conclusion that the Secretary conferred authority on the Temoak Bands to maintain this suit on behalf of other Western Shoshone Indians who are not members of the Temoak Bands. The approval by the Secretary of the Indian Reorganization Act Corporation conferred authority to generally represent its members, but it did not confer such authority as to the entire group of Western Shoshones who were plainly not its members. Even as to its own membership there is no evidence that the Temoak Bands was "recognized" for the purpose of bringing this suit.

¹¹25 U.S.C. 70(i).

group only where the Secretary had recognized the authority of the tribal organization as the general representative of "such tribe, band or group", that is, where the tribal organization and the claiming entity were co-extensive, and all the members of the entity would have political redress through the channels of the tribal organization.¹² However, the Commission and the Court of Claims in the instant case, have interpreted Section 10 so that any "recognized" tribal organization has the privilege of exclusively representing an entire "identifiable group," regardless of whether the tribal organization is coextensive with the claimant group or, as in the instant case, is merely a minority sub-group, which happens to have a federally approved charter to govern the sub-group. Whether created by Congress or judicial interpretation, the result is a form of class or representative action where most members of the "identifiable group" have no political or other internal mechanism to control the representative before the Commission. However, neither the Act nor the Rules of the Indian Claims Commission contain the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure.

Under Section 10 of the Act, the only exception to the exclusive privilege of representation is where "fraud, collusion, or laches" is shown to the satisfaction of the Commission. While the issue was thus cast in terms of

¹²Prior to the instant case, this was the interpretation of Section 10 adopted by the Court of Claims. See *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 954 (Ct. Cl. 1974 [Discussed n. 18, (App. 48a)])

"collusion", in reality the question was one of "access" involving "notice" and "opportunity to be heard and present evidence". Therefore, petitioners sought an interpretation of "collusion" which would give them the opportunity to appear simply because the representative entity and the United States were concurrently, and in petitioners' view, falsely maintaining that title to their lands had passed to the United States. Petitioners contended that such an interpretation, permitting access to the tribunal which was adjudicating their rights, was mandated by the holdings of this Court pertaining to the due process rights of non-appearing members of representative actions, e.g., *Eisen v. Carlisle & Jacquelin*, 416 U.S. 156 (1974); *Mullane v. Hanover Bank and Trust Company*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940).

The Commission and the Court of Claims below rejected this construction in favor of giving the representative organization, the Temoak Bands, a free hand, regardless of the contrary interests of the remainder of the Identifiable Group. The vice in such a construction is obvious, and the Constitutional objections which are of concern to this Court are clear, when the lower courts' reading of the "collusion" provisions of Section 10, as obviating the "notice" and "opportunity to be heard" provisions of Section 17, are considered. The result is that neither the Act nor the Rules of the Indian Claims Commission afford the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure. This Court

should consider if a reading of Section 10 which does not incorporate those safeguards is Constitutionally permissible. E.g., *Smith v. Swarmstedt*, 16 How [57 U.S.] 288, 302-3 (1853).

Nor is the question limited to Indian claims under the Act. Native Americans, among other minorities, are increasingly involved in representative proceedings before the federal district courts. Recent decades have also seen a proliferation of representative proceedings in the form of class actions, shareholders' derivative suits, and representative actions by protective committees or similar organizations such as in the areas of consumer and environmental protection. The expanding use of doctrines such as collateral estoppel also require careful consideration of safeguards in representative proceedings.

In the alternative to their request for a liberal construction of the term "collusion", petitioners also requested an opportunity to produce evidence before the Commission showing "collusion" between the United States and Counsel for the Temoak Bands under *any* definition of that term. However, the Commission declined to either liberally interpret "collusion" between the United States and counsel for the Temoak Bands and grant a hearing on the title question, or hold an *evidentiary* hearing on the threshold question of "collusion" as defined by the Commission. Instead, the Commission adopted the Black's Law Dictionary definition of "collusion" and then, *based solely on the evidence put in the record by the parties charged with collusion*, found that no collusion had been shown. (App. 9-16a)

It is respectfully submitted that this Court should

issue a Writ of Certiorari to determine if Indian claimants who are before the Indian Claims Commission as members of an "identifiable group" have the right to independent access to the Commission where they have no political or other control over the representative organization, and that organization, in agreement with the United States, is taking a position adverse to the property interests of those seeking access. In other words, do Indians have the minimum right to access to the tribunal affecting their property interests which this Court has guaranteed to other Americans? If not, and if Indian claimants have the burden of proving an actual secret, collusive agreement in order to gain access, this Court should decide whether such Indians have, at least, a basic due process right to present evidence to meet the burden of proof.

The action of the Court of Claims proceeds on the assumption that petitioners are bound by the 1967 decision of the Commission concerning the value of Western Shoshone lands, entered pursuant to the 1966 stipulation of the Identifiable Group and the government on the valuation. That might well be so had petitioners been accorded notice and an opportunity to be heard at that time, but the disposition by the Court of Claims merely begs that crucially important question. In fact, the issues of notice and opportunity to be heard were scarcely addressed, and petitioners were given no opportunity — despite their request — to adduce evidence.

The issue is one addressed to the Constitutional requirement of procedural due process. This Court has said that when a state adopts a procedure for representative proceedings, the requirements of due process are that

"the procedure [be] so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure full and fair consideration of the common issue", *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). Is the requirement any less if the representative procedure is devised by an act of Congress and judicial interpretation, or if it is Indian rights at issue rather than those of a black minority?

It is apparent that Congress did not intend to deny interested parties access to the Indian Claims Commission. Section 17 of the Indian Claims Commission Act declares that "interested parties" are entitled to "notice" and an "opportunity to be heard and to present evidence".¹³ In other settings, those words have been held to require notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Company*, 399 U.S. 306, 314 (1950). See also, *Eisen v. Carlisle & Jacquelin*, 416 U.S. 156 (1974).

The holdings of the lower tribunals in this case, effectively repeal Section 17 of the Act while enhancing the barriers to access to the Commission created by the exclusive representation provisions of Section 10 of the Act. The Court of Claims, without so much as an inquiry into whether actual notice had been afforded petitioners, and without any consideration that the case was not at the

¹³25 U.S.C. §70(p).

final judgment stage,¹⁴ concluded that petitioners were chargeable with notice of the legal niceties of these proceedings and bound by their failure to directly contact the Indian Claims Commission at an earlier date. To the contrary, this Court has said that:

“... when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.” *Eisen, supra*, at 315.

The Court of Claims recently declared that “the jury is not yet in” on the binding effect of class judgment on absentees.” *Quinalt Allottee Ass'n v. United States*, 453 F.2d 1272, 1275 (Ct. Cl. 1972). This Court, in *Eisen v. Carlisle & Jacquelin*, 416 U.S. 156 (1974), supplied the missing verdict that class members are entitled to careful notice and an opportunity to withdraw. The disposition of this matter by the lower courts is inconsistent with that important recent precedent, at least if due process is the same in these related settings. If it is not, and Indian groups are to be subjected to second class due process, such a radical exception to one of the of the most funda-

¹⁴The Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission are not final judgments and can be modified at any time up to the final report of the judgment to Congress. See *Caddo Tribe of Oklahoma v. U.S.* 140 Ct. Cl. 63, 81 (1957).

mental precepts of the Constitution should only be implemented after review by this Court.

II.

THE LOWER COURTS' TREATMENT OF THE LACHES QUESTION SO FAR DEPARTS FROM ACCEPTED PRACTICE THAT REVIEW SHOULD BE GRANTED.

The Court of Claims, with commendable candor, acknowledged its decision to be based upon the supposed laches of petitioners in (1) filing their Petition twelve years after the Commission's determination that title was extinguished (App. 34a), and (2) in that petitioners were aware “for a very long time” of the position that had been taken by Claims Counsel (App. 35a). Yet there is no suggestion that any party is prejudiced by the delay, or that the delay was unreasonable, measured by petitioners' degree of sophistication or access to independent legal counsel.¹⁵ There is also no suggestion of any legal or pro-

¹⁵At App. 43a, the Court of Claims alludes to “prejudice to the other parties,” but no such prejudice is recited and in context it is clear that the Court had reference to the investment in time by claims counsel. While the Indian Claims Commission Act in Section 15, 25 U.S.C. 70(n) provides for compensation of Claims Attorneys in proportion to the size of the award, that is, the amount of Indian land such counsel can show has been taken by the United States, there is no provision for providing legal assistance to Indian groups who wish to preserve claims of title to land or, at least, test the validity of such title before accepting compensation. Until recently, the obtaining of counsel to undertake litigation of this size was practically impossible for traditional Indians. Documents submitted to the Commission and Court Claims show repeated attempts by petitioners to obtain independent counsel over many years.

cedural barrier to the Commission entertaining the proposed amended claim, however late it had been asserted and, indeed, there was no legal barrier to amendment of the claim since the case had not yet reached the final judgment stage.¹⁶ To the contrary, the Court of Claims based its ruling on laches on prejudice to the Claims Attorney:

On this Nevada-land phase of the Western Shoshone claims there was very little left to do; much time had passed, and much had been done. (App. 35a)

The members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible—and not after much work has been done, and years have passed . . . It is far too late . . . to upset the applecart after the fruit has been so carefully collected and piled . . . (App. 50a)

The respondents' concern over delay which would occur if petitioners were afforded their day in court seems less than genuine when the amount of time those parties have been willing to consume in their efforts to keep petitioners from being heard is considered. It should also be noted that there would have been no delay if the respondents had timely notified the Commission themselves that petitioners were asserting title to the twelve million acres.

¹⁶The "collusion" exception to the exclusive representative provisions of Section 10, 25 U.S.C. § 70(i) does not contain any time limitation and the Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission can be modified at any time up to final report to Congress. See *Caddo Tribe of Oklahoma v. United States*, 140 Ct. Cl. 63, 81 (1957).

The lower courts' treatment of the laches issue so far departs from accepted legal principles, in at least three respects, that review by this Court is appropriate.

First, the doctrine of laches is based upon the principle that asserting a stale claim will cause prejudice "to an adverse party."¹⁷ If that doctrine is to be expanded to protect the investment of time by counsel in achieving a result not desired by the litigant, or the inconsistent efforts of a tribunal which is invested with the responsibility of preserving the claim, the wisdom of such an extension merits the attention of this Court.

Second, the doctrine of laches is normally not invoked against Indian claimants because of their wardship relation with the sovereign. It is axiomatic, of course, that laches may not be invoked against the sovereign, or against Indians when they assert rights that might be asserted for them by the sovereign. See Brief of U.S., Amicus Curiae in opposition to Petition for Certiorari in *Capital Grande Band of Indians v. Helix Irrigation Dist.*, Docket No. 73-2956 (October Term, 1973). If laches is to be invoked against Indians by the United States in pressing their claims, it should be only after this Court has examined the wisdom of such a change in the policy of the law.

Third, counsel for the Identifiable Group, the Temoak Bands, and various agents of the United States had been informed before, and throughout the litigation, that petitioners and their predecessors wished to assert their title rather than seek money for their lands. That

¹⁷E.g., 27 Am Jur, Equity, §152.

these parties succeeded in keeping the Commission uninformed that the owners of the land were objecting, and relied upon the inability of isolated and impoverished Indians to secure independent counsel to make a formal presentation, is certainly not reason to give them the equitable protection of laches.

CONCLUSION

This case presents issues of procedural due process in representative actions which are of great importance in view of the burgeoning utilization of such actions as society becomes more complex. The goal of procedural due process is, at least, to give those affected by litigation an opportunity to be heard in protection of their interests. The interests involved in this case are of the greatest magnitude—in dollar terms by Anglo-American values, and in terms of cultural survival by traditional Western Shoshone values. The national publicity associated with this case is indicative of the interest all Americans have in seeing whether the Indian Claims Commission Act is a sincere attempt to remedy centuries of wrongs against Native Americans or just another scheme for spending taxpayers' money primarily for the benefit of the implementors of the system. These aspects of the Indian Claims Commission Act have not been previously examined by this Court.

It is respectfully submitted that this Court should issue a Writ of Certiorari not only to clarify the rights

of persons bound by representative proceedings, but to establish the integrity and credibility of the judicial branch of government in the eyes of all Americans.

Respectfully submitted,

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APPENDIX

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Opinion of the Indian Claims Commission

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

**THE WESTERN SHOSHONE IDENTIFIABLE
GROUP, REPRESENTED BY THE TEMOAK
BANDS OF WESTERN SHOSHONE IN-
DIANS, NEVADA,**

Plaintiff,

**WESTERN SHOSHONE LEGAL DEFENSE
AND EDUCATION ASSOCIATION and
FRANK TEMOKE,**

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: February 20, 1975

Appearances:

Robert W. Barker, *Attorney for Plaintiffs.*

John D. O'Connell, *Attorney for Petitioners.*

**MaryEllen A. Brown, with whom was
Assistant Attorney General, Wallace H.
Johnson, *Attorneys for Defendant.***

Appendix—Opinion of the Indian Claims Commission

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

On April 18, 1974, the Western Shoshone Legal Defense and Education Association, an unincorporated group, and Frank Temoke, by and through their counsel, petitioned the Commission pursuant to Section 10 of the Indian Claims Commission Act (60 Stat. 1049, 1052) and sections 1(c), 8(b), and 13 of the General Rules of Procedure of the Commission (25 C.F.R. §§503.1(c), 503.8(b), 503.13), for a stay of the proceedings and for leave to present an amended claim in the above-identified case.¹ The petitioners are individual members of the plain-

¹Section 10 of the Indian Claims Commission Act provides that:

Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

The General Rules of Procedure relied on by the petitioner provide as follows:

Section 1. Plaintiffs.

....
....

(c) Where by virtue of fraud, collusion or laches on the part of a recognized tribal organization a claim has not been presented (or has not been included as part of a presented claim), any member of such tribe, band or group may file claim on behalf of all the other members of such

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tiff Western Shoshone Identifiable Group. The plaintiff, through its attorney of record, filed a memorandum opposing the petition, and the defendant filed a motion to dismiss it. Thereafter, the petitioners responded to the

tribe, band or group upon complying with the provisions of Sec. 8(a).

Section 8. Capacity.

(b) If a petition is filed by one or more members of a tribe, band or other identifiable group having a tribal organization which is recognized by the Secretary of the Interior because the tribal organization has failed or refused to take any action authorized by the act, the petition shall be verified and shall aver that the petitioner is a member of the tribe, band or group. The petitioner shall also set forth with particularity the efforts of the petitioner to secure from the duly constituted and recognized officers of said tribal organization such action as he desires and the reasons for his failure to obtain such action (such as fraud, collusion or laches) or the reasons for not making such effort.

Sec. 13. Amended and supplemental pleadings.

(a) *Amendments.* (1) A party may amend its pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for hearing, it may so amend it at any time within 20 days after it is served. Otherwise a party may amend its pleading only by leave of the Commission or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time allowed for responding to an original pleading, unless the Commission otherwise orders.

* * *

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

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opposition of both the plaintiff and the defendant. By order of October 2, 1974, the Commission set oral argument for November 14, 1974, on the issue of collusion. On November 7, 1974, the petitioners filed a memorandum on collusion. The plaintiff filed a memorandum on collusion on November 13, 1974. At the oral argument the defendant moved to strike the petitioners' memorandum of November 7 and the plaintiff's memorandum of November 13, or, in the alternative, that the defendant be granted time to reply to these pleadings if the defendant deemed such a reply to be advisable. The Commission, by order of November 20, 1974, denied the motion to strike, and allowed 30 days for the defendant to respond. On November 25, 1974, the defendant advised the Commission that it did not desire to respond further to the plaintiff's and the petitioners' pleadings of November 7 and 13, 1974.

The crux of the petition for a stay is the assertion that, in effect, the Indian title to the greater portion of the aboriginal lands of the Western Shoshones, plaintiffs in Docket 326-K, has not been extinguished, but that such lands are unoccupied and under the supervision of the United States which, as guardian of the Western Shoshones, has the duty of supervising and protecting their property. The petitioners also assert that the Docket 326-K proceeding before the Commission, seeking an award of damages, will extinguish the Western Shoshones' claim to lands, title to which petitioners allege has never been extinguished by the United States, and that

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the Temoak Bands and the United States have collusively, included, within the Docket 326-K claim, lands still owned by the Western Shoshones, thus "selling" Western Shoshone lands to the United States. The petition is apparently intended to refer only to aboriginal lands of the Western Shoshones in Nevada, amounting to 22,211,753 acres (exclusive of reservations), and does not affect their aboriginal lands in California.

The defendant asserts and the petitioners² deny that the petition is barred by Section 12 of the Indian Claim Act (60 Stat. 1049, 1052), which provides that no claim existing before, but not presented within five years after the date of approval of the Act (August 13, 1946), may thereafter be submitted to any court or administrative agency for consideration. The petitioners point out that under their proposal, the quantity of land in the Docket 326-K claim would be reduced, but except for that and a change in the valuation date for the Nevada lands, the claim would not be changed.

The original Docket 326 petition contained specific counts setting forth the claims of the Western Bands of the Shoshone Nation of Indians.³ Paragraphs 23 and 25 of this petition, filed on August 10, 1951, state that:

²In this opinion we refer to Western Shoshone Legal Defense and Education Association and Frank Temoke as "petitioners", and the Western Shoshone Identifiable Group as "plaintiff."

³By Commission order of August 16, 1967, the claim of the Western Shoshone Identifiable Group was severed from the claims filed in Docket 326 on August 10, 1951, for five groups of Shoshones including the Western Shoshones, and the Western Shoshone claim was designated Docket No. 326-K.

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23. Prior to 1863 and from time immemorial, the Western Bands of the Shoshone Nation of Indians, represented herein by the Te-Moak Bands of Western Shoshone Indians, Nevada, owned or occupied a large territory of land in the present State of Nevada, including the lands set forth in the Treaty of Ruby Valley of October 1, 1863, referred to in paragraph 6(f) hereof and shown on Exhibits A and B attached hereto.

25. In violation of said Western Bands' rights of ownership or occupancy in the lands referred to in paragraph 15 hereof, or in violation of the right or title or ownership or occupancy recognized in the said bands by the Treaty of Ruby Valley, defendant has disposed of a large part of the said land to settlers and others, or has seized and converted a large part of the said lands to its own use and benefit, without any compensation to the said Western Bands or compensation agreed to by them. Alternatively, thereby defendant has not dealt fairly and honorably with said Western Bands.

These paragraphs, describing plaintiff's land and alleging, among other things, that the United States converted a large part of these lands to its own use and benefit, were denied in the defendant's answer, putting in issue from the outset of this proceeding the question whether the United States converted to its own use and benefit a large part of the Western Shoshone aboriginal lands, including those described in the October 1, 1863, Treaty of Ruby Valley (18 Stat. 689). The quoted paragraphs seem

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broad enough to support the petitioners' assertions to a smaller quantity of land than the 22,211,753 acres in Nevada to which the Western Shoshones' aboriginal title was extinguished as determined by Findings 23 and 26 in the Commission's adjudication in the title phase of Docket 326-K (11 Ind. Cl. Comm. 387, 413-14, 416). Accordingly, we do not agree with the defendant's arguments that the petitioners are attempting to present a new claim barred by section 12 of the Indian Claims Commission Act.

In substance, the petition for a stay is a request that the Commission reconsider basic portions of its findings in the title and valuation proceedings in Docket 326-K relating to the quantity of land in Nevada which the United States acquired from the Western Shoshones, and to the date as of which the Nevada lands should be valued. The parties by stipulation agreed to a date which was approved by Commission order of February 11, 1966. The petitioners request a hearing before the Commission on these matters, making their petition the equivalent of a motion for rehearing. Such a motion should have been filed within 30 days after the title decision was issued on October 16, 1962. (Section 33 of the Commission's General Rules of Procedure.) Since October, 1962, when the title phase of this case was completed, the plaintiff and defendant have spent large amounts of money in having appraisals made of the land and in preparing for other aspects of the valuation proceeding in this docket. The desirability of protecting large

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expenditures of time and money made in support of adjudications under the Indian Claims Commission Act, in itself, would ordinarily be sufficient reason for not considering a motion for rehearing which is many years late, as this is. Not only is the petitioners' request filed over 11 years late, it fails to meet other requirements of Section 33 of the Rules which provide that motions for rehearing specify errors of fact and law with full references to evidence and authorities relied upon. The petition is unsupported by any data which would justify reopening or rehearing the question of the quantity of land to which Indian title has been extinguished or the related matters of the evaluation dates.

Moreover, Commission rules permit amendment by members of plaintiff tribe, as petitioners are, only in situations where, because of fraud, collusion, or laches by the recognized tribal organization, a claim has not been presented (or has not been included as part of a presented claim). (Sec. 1(c) Rules of Procedure, see note 1, *supra*.) The petitioners try to meet this requirement with the assertion that counsel for the parties have acted collusively in refusing to acknowledge that the Western Shoshone aboriginal title is unextinguished over much of the land included in Docket 326-K, and this refusal might jeopardize a valid claim of the Western Shoshones to some of their aboriginal lands in Nevada. We conclude, for the reasons discussed below, that in addition to the lateness of this petition, the contentions of collusion upon which the petition and supporting statements are based are untenable, and that no grounds are alleged or appear

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of record which would warrant granting the requested stay of proceedings or the petition to amend, even if the requests had been timely filed.

Collusion has been defined as an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. (Black's *Law Dictionary* 331 (rev. 4th ed. (1968)).)

We shall first consider the petitioners' assertions of collusion between the plaintiff's counsel and the defendant regarding the area of plaintiff's aboriginal land and the extinguishment of the Western Shoshones' use and occupancy title to that land. The original petition, the defendant's answer, and the entire record in Docket 326⁴ indicate that the petitioners' charge of collusion has no basis in fact. The location of the land involved in this proceeding is referred to in paragraphs 23 and 25 (quoted above) of the plaintiff's 1951 petition. Defendant denied plaintiff's allegations. Both parties introduced evidence on the issue of plaintiff's aboriginal title and the issue was tried in an adversary proceeding. Far from being the result of agreement or collusion between the plaintiff's counsel and the defendant, the Commission's Finding 23 relating to the area of plaintiff's use and occupancy at the time of the Treaty of Ruby Valley, and Finding 26 relating to the extinguishment of aboriginal Indian title,

⁴See note 3.

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were based on issues resolved after hearing before the Commission, and on the consideration of oral and documentary evidence. In fact, in the title phase of this case, the area of aboriginal use and occupancy by the plaintiff and the extinguishment plaintiff's aboriginal title were fundamental prerequisites in establishing the plaintiff's claim. In the original petition filed in Docket 326 on August 10, 1951, paragraph 23 alleged aboriginal title in the Western Shoshones to a large territory of land in Nevada, including the lands set forth in the Treaty of Ruby Valley. In paragraphs 25 and 26 of the petition, it was alleged that defendant seized and converted a large part of the plaintiff's lands to the use and benefit of the defendant, in violation of the Treaty of Ruby Valley and without payment of compensation to the plaintiff. In its answer, filed on July 31, 1952, the defendant denied both the allegation of aboriginal ownership in the plaintiff and the allegations of seizure and conversion. After hearing and weighing the evidence, the Commission determined in Finding 26 (11 Ind. Cl. Comm. 837 at 416) as follows:

The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted

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and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without the payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

We note particularly that the Commission determined, in addition to the gradual encroachment on Western Shoshone lands by whites, settlers, and others, that the United States had acquired, disposed of, or taken, for its own use and benefit, lands of the plaintiff. This finding is an adjudication that title was extinguished, as stated expressly in paragraph 6 of the Commission's interlocutory order of October 16, 1962, in which the Commission concluded as a matter of law and fact:

6. That the Western Shoshone identifiable group exclusively used and occupied the lands described in Finding of Fact No. 23; that the Indian title to such of the lands of the Western Shoshone group as are located in the present State of California was extinguished on March 3, 1853; and that as to the remainder of the lands of the Western Shoshone, Indian title was extinguished by the gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of said lands by the United

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States for its own use and benefit, or the use and benefit of its citizens. [11 Ind. Cl. Comm. 387, 446 (1962).]

This brief summary of the process of adjudication of the quantity of land involved and of the extinguishment of aboriginal title demonstrates that, contrary to the petitioners' assertions of collusion, these issues were tried and determined by the Commission after hearing and considering the evidence of both parties thereon.

However, the determination of the date for valuation of plaintiff's Nevada land was concluded in a different way. The Commission's determination that the extinguishment of the plaintiff's aboriginal title to these lands was gradual (not a sudden extinguishment) was the basis of its holding in Finding 23 that it might not then set the date of acquisition of these lands by the United States. The Commission found that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Western Shoshones as public lands from a date or dates long prior to the title proceeding, such date or dates to be thereafter determined upon further proof, unless the plaintiff and defendant agreed upon a date. The requirement that further proof be taken unless the parties agreed upon the date or dates when the defendant acquired, controlled, or treated the plaintiff's lands as public lands was contained in Finding 26 of the Commission title decision issued on October 16, 1962.

Subsequently, by order of February 11, 1966, the Commission approved a joint stipulation of the plaintiff

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and the defendant, entered into in lieu of further proof and adjudication by the Commission on the valuation date, as follows:

Counsel for both parties, having reviewed pertinent information relating to the time as of which the Western Shoshone lands in Nevada (Indian Claims Commission Finding No. 23) should be valued, hereby stipulate that the Nevada portion of the Western Shoshone lands in dockets 326 and 367 shall be valued as of July 1, 1972.

In support of the charge of collusion, the petitioners assert that the stipulated evaluation date for plaintiff's Nevada lands is detrimental to the interest of the plaintiff (all Western Shoshones) without indication of evidence to sustain the charge. The Court of Claims has held that the date of extinguishment of Indian title is the date the government actually takes over possession or exerts dominion. It may occur when the federal government ousts the Indians under a claim of right, gets possession of the land, or otherwise asserts dominion. (*Pillager Bands of Chippewa Indians v. United States*, 192 Ct. Cl. 698, 428 F.2d 1274 (1970), *aff'g* Docket 144, 21 Ind. Cl. 1 (1969); *see Simon Plamondon ex rel. Cowlitz Tribe v. United States*, 199 Ct. Cl. 523, 467 F.2d 935 (1972), *aff'g* Docket 218, 25 Ind. Cl. Comm. 442 (1971). The petitioners' assertions to the effect that the agreement of the parties about the evaluation date for Nevada land was collusive seem to stem from a supposition that there was

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no evidence on this matter. As indicated above, in our discussion of the basis of Finding 26 in the title decision herein, the very question was in issue and resolved by the finding of gradual encroachment and taking. The approval by the Commission in its order of February 11, 1966, of the stipulated date agreed to by the parties as the evaluation date for the Nevada lands was a determination that the stipulated date was acceptable. If the date had been unfair to the plaintiff, the Commission would not have approved it.

Where, as in this case, there was no single clearcut extinguishment of Indian title as of one date or even a few dates certain, and the extinguishment was by gradual encroachment over a considerable period of time, it has been customary to rely on a composite or average date for the purpose of valuing the lands. This eliminates the cost and delay in considering every single taking date or disposition of land. As Judge Nichols recently noted in a case which involved the use of an "average date" of extinguishment for the purpose of valuing aboriginal title lands of the Northern Paiute Indians in Nevada, "... The Commission previously had asked the parties to try to agree on an 'average date'. 7 I.C.C. at 419. Such a legal shortcut is often necessary in Indian claims litigation if it is ever to be concluded, and has the sanction of the Supreme Court." *United States v. Northern Paiute Nation*, 203 Ct. Cl. 468, 473; 490 F.2d 954, 957 (1974), *rev'g. on other grounds* Docket 87-A, 28 Ind. Cl. Comm. 256 (1972). *See Creek Nation v. United States*, 302 U.S. 620

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(1938). The Court of Claims has also held that the Commission has discretion to select an average "taking date" for valuation purposes for all lands where the "taking" extended over a number of years, but that it is not bound to do so. *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 569, 390 F.2d 686, 701 (1968) *aff'g in part, rev'g in part*, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965).) Accordingly, an evaluation date which is agreed to by the parties with the approval of the Commission, dispenses with the necessity of further proof on the question of the dates of extinguishment of plaintiff's aboriginal title, but it is no indication of collusion between the parties. Since no objection to the evaluation date for the Nevada lands was raised until long after the date was approved, expensive appraisal studies based upon the date were made for both parties herein, and a valuation trial held and a decision based thereon issued, only the possibility of serious injustice would warrant reconsideration of the stipulated date. We find no basis for petitioners' charge of collusion.

To clarify our conclusion, one further argument in support of the charge of collusion will be noted. The petitioners, members of the plaintiff Western Shoshone Bands, disagree with the plaintiff's counsel about the proper presentation of the claim in this docket. However, the contention of the petitioners, that their position is not rightfully represented by the plaintiff's counsel, does not support their charges of collusion against the plaintiff's counsel and the defendant. The petitioners' reliance on

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cases involving class actions is of no avail in trying to establish collusion between the plaintiff's counsel and the defendant because the class action cases involved individuals having separate rights, some of whom were not represented, and these are clearly distinguishable from cases involving the interests in tribal property of the members of an Indian tribe. This follows from the fact that a member of an Indian tribe does not have individual ownership in tribal lands. *Minnesota Chippewa Tribe v. United States*, 161 Ct. Cl. 258, 315 F.2d. 906 (1963), *rev'g in part* 8 Ind. Cl. Comm. 781 (1960) Docket 18-B; *Spokane Tribe of Indians v. United States*, 163 Ct. Cl. 58 (1963) *aff'g in part, rev'g in part* 9 Ind. Cl. Comm. 236 (1961), Docket 331.

There being nothing to support a charge of collusion, the petitioners have no standing to amend the Docket 326-K claim, and the Commission is not required to consider any of petitioners' legal arguments. Nonetheless, without ruling on their arguments, we will note our views on some of the propositions advanced by the petitioners.

The crux of the petitioners' legal position is the contention that aboriginal title to large portions of plaintiff's land has not been extinguished because the treaty provided the only methods by which plaintiff's aboriginal title might be extinguished and the United States obtained and is holding large quantities of former aboriginal lands of the plaintiff for purposes not authorized by the treaty. Thus, it is contended, the Treaty of Ruby Valley antici-

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by the defendant for roads and military posts and used by non-Indians for specific uses such as mining and agricultural development. But the petitioners argue in substance that the treaty did not permit the United States to acquire lands for inclusion in national forests and grazing districts, although many of plaintiff's former aboriginal lands have for many years been included in and administered as federal land and part of a national forest or a federal grazing district. The Supreme Court observed in *United States v. Santa Fe Pacific Ry.*, 314 U.S. 339, 347 (1947) that the power of Congress is supreme with regard to the extinguishment of Indian title based on aboriginal possession, adding:

The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz v. Northern Pacific Railroad*, As stated by *Johnson v. M'Intosh* . . . "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525.

If, as petitioners maintain, the treaty did not authorize the use of plaintiff's aboriginal lands for some of the purposes for which the United States took them, *e.g.*, for national forests or for federal grazing districts, Congress had full power to authorize such uses by subsequent legislation which superseded the treaty in this respect. (*See*

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Lone Wolf v. Hitchcock, 187 U.S. 553, 564-568 (1903); F. Cohen, *Handbook of Federal Indian Law*, Ch. 3, §6 (1945)).

A further legal argument of the petitioners is the contention that the Treaty of Ruby Valley gave the Western Shoshones recognized title to the lands described in that treaty. Recognized title is a technical term which the courts use to describe a legal right or interest in land which Congress intended to grant to an Indian tribe. In *Miami Tribe v. United States*, 146 Ct. Cl. 421, 439; 175 F. Supp. 926, 936 (1959), *aff'g in part* Docket 67 et al. 2 Ind. Cl. Comm. 617 (1954), the Court of Claims described recognized title as follows:

Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently occupy* and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", "recognized title", and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways. *Tee-Hit-Ton v. United States*, 348 U.S. 272; *Hynes v. Grimes Packing Co.*, 337 U.S. 86; *Minnesota v. Hitchcock*, 185 U.S. 373.

In *Sac and Fox Tribe v. United States*, 161 Ct. Cl. 189, 192-93, (1963), *cert. denied*, 375 U.S. 921 (1963)

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(*aff'g* Docket 83, 7 Ind. Cl. Comm. 675 (1959)), the court relied on its definition of recognized title in *Minnesota Chippewa Tribe v. United States*, *supra*, stating that:

... Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land.

Articles V and VI are the only provisions in the Treaty of Ruby Valley (8 Stat. 689) on which the claim for recognized title might be based. Article V described lands claimed and occupied by some of the Western Shoshone Bands at the time of the treaty but contained no grant of legal rights to the Western Shoshones in those lands. Article VI of the treaty provided that whenever the President deemed it proper, he would make reservations for the use of the Shoshones within the areas described in Article V. Under Article VI the Western Shoshones agreed to move to such reservations as the President might indicate, and to reside and remain therein. This provision does not recognize or grant any permanent right to the lands except those which, at a later date, the President might designate for reservations. If Articles V and VI of the Treaty of Ruby Valley are compared with Articles IV and V of the Treaty of Greeneville (7 Stat. 49), which the petitioners cited and which, when

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read with subsequent treaties of cession, has been held to have granted recognized title to the signatory tribes, the difference in the intent of these provisions in the respective treaties seems unequivocal. In Articles IV and V of the Treaty of Greeneville, the United States recognized title in the Indian treaty tribes by relinquishing its claims to specified Indian lands, reciting that the Indians who had a right to the lands were to quietly enjoy them, hunting, planting and, dwelling thereon so long as they pleased. The treaty provided that the Indians might sell their lands but only to the United States; and, until such sale, the United States promised to protect the Indians in the quiet enjoyment of their lands against citizens of the United States and other white intruders. No such rights were granted the Western Shoshones in the Treaty of Ruby Valley.

In *Crow Tribe v. United States*, 151 Ct. Cl. 281 (1960), *cert. den.* 366 U.S. 924 (1961), the Court of Claims concluded that the Crow and other tribes held their lands under the Treaty of Fort Laramie of September 17, 1851 (11 Stat. 749), by recognized title. In the *Crow* case and in *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933) *cert. denied*, 292 U.S. 606 (1933), the court held that the Treaty of Fort Laramie was a treaty of recognition. The treaty fixed boundaries within which the tribes agreed to reside. In Article III of the Fort Laramie Treaty, the United States bound itself to protect the Indian signatories against the commission of depredations by the people of the United States, and in Article IV the Indian tribes agreed to make restitution for

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any wrongs by their people against people of the United States lawfully residing in or passing through the tribes' respective territories. The court concluded that the language of the treaty, and its purpose and intent as a whole, assured to each of the participating tribes title to the lands set aside. No such recognition of permanent legal rights is contained in the Treaty of Ruby Valley.

We note one other matter, namely, the petitioners' characterization of an award to the plaintiff in this case as the equivalent of a purchase by the United States of part of the Western Shoshones' aboriginal lands. Equating the present proceeding to a sale of aboriginal title is incorrect. The Commission determined in the title proceeding that the Western Shoshones have no present tribal interest in their former aboriginal lands (Finding 26, quoted above). The claim in Docket 326-K arose from the defendant's gradual acquisitions of Western Shoshone lands after October 1, 1863, without proper payment to the plaintiff. Nothing in the Indian Claims Commission Act authorizes the restoration of lands to Indian claimants. The remedy which this Commission may provide is to find and award the value of land, tribal title to which has been extinguished. Congressional action is the only means by which tribal title in former aboriginal lands might be restored to the Western Shoshones.

The petitioners request the Commission to suspend further action in this proceeding until the United States District Court for the Nevada District has decided the trespass action brought by the United States for a re-

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straining order and for a permanent injunction against two individual Western Shoshones in the case of *United States v. Dann*, Civil No. R-74-60, BRT, (D. Nev.). The case assertedly involves the right of two Indians to use for their own grazing purposes, without permission of the United States, lands within the boundaries of plaintiff's former aboriginal lands which are now claimed and managed by the United States as public land. As the plaintiff has noted, individual Indians have no ownership interest or title in tribal lands. The District Court proceeding involving the legality of the use of plaintiff's former aboriginal lands outside of the reservation areas, by individual Western Shoshone Indians, does not raise issues which seem to us to warrant further delaying the proceedings before this Commission involving a tribal claim against the United States.

For the reasons discussed herein, we conclude that the petition for a stay of proceedings and for leave to present an amended claim in this docket should be dismissed. An order to this effect is this day being entered herein.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarbrough, Commissioner

Brantley Blue, Commissioner

Order of the Indian Claims Commission**BEFORE THE INDIAN CLAIMS COMMISSION**

Docket No. 326-K

**THE WESTERN SHOSHONE IDENTIFIABLE
GROUP, REPRESENTED BY THE TEMOAK
BANDS OF WESTERN SHOSHONE IN-
DIANS, NEVADA,**

Plaintiff,

**WESTERN SHOSHONE LEGAL DEFENSE
AND EDUCATION ASSOCIATION and
FRANK TEMOKE,**

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

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**ORDER DENYING PETITION TO STAY
PROCEEDINGS AND PRESENT AN
AMENDED CLAIM AND FOR
OTHER PURPOSES**

On April 18, 1974, the Western Shoshone Legal Defense and Education Association and Frank Temoke (petitioners) filed a document entitled "Petition To Stay Proceedings And For Leave To Present Amended Claim," requesting leave "to present an amended claim" which would exclude from the claim being adjudicated in Docket 326-K a large amount of Nevada lands as to which petitioners assert Indian title has not been extinguished. Petitioners base their right to appear on behalf of the Western Shoshone Indians on the allegation that the Temoak Bands of Western Shoshone Indians and the United States have acted in collusion to include in the Docket 326-K claim lands which still belong to the Western Shoshone people.

On May 1, 1974, the defendant moved to dismiss the petition on a number of grounds, asserting, among other things, that the petitioners are attempting to present a new claim prohibited by Section 12 of the Indian Claims Commission Act which bars consideration of claims existing before but not presented by August 13, 1951 (60 Stat. 1049, 1052); that the petitioners have failed to state a claim upon which relief can be granted; that petitioners lack capacity to maintain this suit on behalf of the plaintiff tribe; and that there is no basis for the charge of col-

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lusion. The petitioners replied to the defendant's motion on May 13, 1974.

On July 1, 1974, the plaintiff filed a memorandum opposing the petition, and on August 2, 1974, the petitioners replied to the plaintiff's memorandum. On August 30, 1974, the plaintiff filed a supplemental memorandum responding to the petitioners' reply.

By order of October 2, 1974, the Commission set oral argument on the issue of collusion for November 14, 1974. On November 7, 1974, the petitioners filed a memorandum on the issue of collusion, and on November 13, 1974, the plaintiff filed a memorandum on collusion. Following oral argument, at which the defendant moved to strike the petitioners' memorandum of November 7, and the plaintiff's memorandum of November 13, or, in the alternative, that the defendant be granted time to reply to these pleadings if the defendant deemed such a reply to be advisable, the Commission, by order of November 20, 1974, denied the motion to strike, and allowed 30 days for the defendant to respond. On November 25, 1974, the defendant advised the Commission that it did not desire to respond further to the plaintiff's and the petitioners' pleadings of November 7 and 13, 1974.

Upon consideration of the foregoing pleadings, the oral argument, and for the reasons set forth in the opinion herein, the Commission concludes that:

1. The petitioners, being members of the plaintiff Temoak Bands, have no standing to amend the Docket

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326-K claim except upon a showing of fraud, collusion, or laches on the part of the recognized tribal organization in the presentation of the claim or failure to present part of the claim, 25 U.S.C. §70i (1970). The claim in Docket 326-K was presented by the Temoak Band of Western Shoshone Indians, Nevada, as representatives of the Western Shoshone Identifiable Group. The Temoak Bands, organized under the Indian Reorganization Act, 25 U.S.C. §461 (1970), and recognized by the Secretary of the Interior as having authority to maintain a suit, were held to have the capacity to maintain the Docket 326-K suit. *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm. 387, 418 (1962). There being nothing to support a charge of collusion, the petitioners have no standing to amend the Docket 326-K claim.

2. The matters which the petitioning Western Shoshone Legal Defense and Education Association seek to present to this Commission do not, in fact, relate to or constitute an amended claim on behalf of the Western Shoshone Indians but amount rather to a motion to have the Commission rehear its previous decisions, namely, the decision on title entered on October 16, 1962, Dockets 326 and 367, 11 Ind. Cl. Comm. 387; the order of February 11, 1966, by which the Commission approved a joint stipulation of the parties which provides that the Western Shoshone land in Nevada should be valued as of July 1, 1872; and the decision on value entered on October 11, 1972, 29 Ind. Cl. Comm. 5. Section 33 of the Commission's General Rules of Procedure requires that motions

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for rehearing be filed within 30 days from the date of the conclusions on the findings complained of. The petitioners' request filed on April 18, 1974, asking, in effect, for reconsideration of Commission opinion and findings of October 16, 1962, was filed over 11 years late. The requirements of section 33 of the rules that errors of fact and errors of law be specified with full reference to evidence and authorities relied on to support the motion have not been met. The petitioners have asserted generalities to support their petition and failed to meet the requirements of the Rules of Procedure in this respect. The petition is unsupported by any data which would justify reopening or rehearing the question of the quantity of land taken or the related questions of the evaluation dates.

IT IS HEREBY ORDERED that the petition of the Western Shoshone Legal Defense and Education Association requesting leave to present an amended claim and for rehearing is dismissed.

Dated at Washington, D.C., this 20th day of February, 1975.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarbrough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Opinion of the Court of Claims

**IN THE UNITED STATES COURT
OF CLAIMS**

Appeal No. 3-75

Ind. Cl. Comm. Docket No. 326-K

(Decided February 18, 1976)

**WESTERN SHOSHONE LEGAL DEFENSE
AND EDUCATION ASSOCIATION, AND
FRANK TEMOKE, APPELLANTS**

v.

**THE UNITED STATES AND THE WESTERN
SHOSHONE IDENTIFIABLE GROUP, REP-
RESENTED BY THE TEMOAK BANDS OF
WESTERN SHOSHONE INDIANS, NE-
VADA, APPELLEES**

Kathryn Collard for appellants; *John D. O'Connell*,
attorney of record.

Robert W. Barker, attorney of record, for appellee,
Western Shoshone Identifiable Group. *Wilkinson, Cra-
gun & Barker, Donald C. Gormley* and *Steven C. Lam-
bert*, of counsel.

Dean K. Dunsmore, with whom was *Acting Assistant
Attorney General Walter Kiechel, Jr.*, for appellee The
United States.

Before DAVIS, SKELTON and KUNZIG, *Judges*.

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ON MOTION TO DISMISS APPEAL FROM THE INDIAN CLAIMS
COMMISSION AND ON APPEAL FROM THE INDIAN CLAIMS
COMMISSION

DAVIS, *Judge*, delivered the opinion of the court:

In August 1951 the Shoshones timely filed a petition with the Indian Claims Commission setting forth, among other claims, a cause of action on behalf of the Western Bands of the Shoshone Nations (represented by plaintiff-appellee Temoak Bands of Western Shoshone Indians) for the taking without compensation of large acreage in Nevada and California, including lands covered by the Treaty with Western Bands of Shoshone Indians (Treaty of Ruby Valley), Oct. 1, 1863, 18 Stat. 689 (1875). The United States denied this alleged taking. In 1957 the Indians' title to this land was tried before the Commission and in 1962 the Commission decided that the claimants held aboriginal title to 24,396,403 acres—22,211,753 in Nevada and 2,184,650 in California. 11 Ind. Cl. Comm. 387, 413-14; *see* 29 Ind. Cl. Comm. 5, 6. For the California property this aboriginal title was found to have been extinguished in March 1853. With respect to the Nevada portion, the Commission determined that the land was continuously used and occupied "until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was

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disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States." 11 Ind. Cl. Comm. at 415-16.

In 1966 the plaintiff-appellee and the defendant-appellee stipulated that the valuation date of the Nevada portion would be July 1, 1872, and on that basis the parties tried, in 1967, the fair market value of this area. In October 1972 the Commission decided the valuation issues, awarding the claimant \$21,550,000 as value on the respective valuation dates and an additional \$4,604,600 for minerals removed from the Nevada tract before the valuation date. 29 Ind. Cl. Comm. 5, 7, 57-58. The Government filed a motion for rehearing which was denied in 1973. 29 Ind. Cl. Comm. 472. In that same year the Government filed its set-offs against the award; these issues were tried and submitted to the Commission by March 5, 1974.

It was at this stage of the proceedings that, on April 18, 1974, appellants Western Shoshone Legal Defense and Education Association and Frank Temoke, as part of the Western Shoshone Identifiable Group, filed their petition to stay proceedings and for leave to present an amended claim. The gist of this petition was that the Western Shoshone still have title to approximately twelve million acres of Nevada land to which the Commission had held Indian title to have been extinguished and for which

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it had made a large award (subject to offsets).¹ Appellants fear that this award, if paid, will bar any future attempt to litigate elsewhere the present title to these lands. *See* 25 U.S.C. § 70u.² Acknowledging that Section 10 of the Claims Commission Act, 25 U.S.C. § 70i, gives a tribal organization recognized by the Secretary of the Interior "the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission," the appellants claimed "collusion" between the appellee Temoak Bands and the Government to treat the title to the lands as extinguished rather than as still held by the Indians.

When the United States and the Western Shoshone Identifiable Group, as represented by the appellee Temoak Bands, both opposed this petition, the Commission had oral argument, principally on the question of collusion, and on February 20, 1975, issued its opinion and order dismissing the petition. 35 Ind. Cl. Comm. 457. Ap-

¹Appellants' theory, in brief, is that the Western Shoshones had recognized title to the lands which was never taken in largest part, and that, even if the ownership was merely aboriginal title, that title could only be ended for the purposes specified in the Treaty of Ruby Valley, *supra*—and title to most of the lands has never been extinguished on those grounds.

²Section 22 of the Indian Claims Commission Act which provides that (1) payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy, and (2) a final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

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pellants then filed a timely notice of appeal which triggered a motion by the Western Shoshone Identifiable Group to dismiss the appeal.

We held oral argument on the motion to dismiss but at that time directed the parties to file briefs on the appeal itself.³ Now we deny the motion to dismiss but affirm the Commission's decision rejecting appellants' petition.

I.

Section 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b), provides for an appeal to this court from any "final determination" of the Commission. We have already ruled that this provision is not limited to those determinations deciding the merits of an Indian entity's claim but embraces all types of holdings made by the Commission, provided always that the requisite finality is present. *Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians*, 173 Ct. Cl. 928, 934-35, 355 F. 2d 936, 939-40 (1965). "The Act nowhere suggests that certain areas of Commission decision are to be left without appellate review and guidance; * * *. Nor does the legislative history intimate that this court's power to review should cover fewer subjects than the Commission's power ^{to} decide." *Ibid.* See also *Cherokee Nation v. United States*, 174 Ct. Cl. 131, 135-39, 355 F. 2d 945, 947-49 (1966). In particular we have held that an order

³The Government did not join in the motion to dismiss the appeal or take any position thereon but it has participated in the consideration of the appeal in support of the Commission's determination.

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definitely denying intervention, on the ground that the intervenor had no right, is sufficiently conclusive for appeal. *Prairie Band of Potawatomi Indians v. United States*, 143 Ct. Cl. 131, 133-35, 165 F. Supp. 139, 141-42 (1958), *cert. denied*, 359 U.S. 908 (1959).

Though it was not formally labeled a motion for intervention, the appellants' petition to the tribunal below was equivalent to such an application.⁴ It sought leave to present an amended claim on behalf of the Western Shoshone Identifiable Group and to argue in support of that position. The Commission treated the petition in the same way it would deal with an intervention motion. It considered whether appellants had a right to participate in this proceeding and, after deciding that they had not, dismissed the petition finally. On that subject nothing was left for further consideration by the Commission; appellants were definitively refused permission to enter the case and the proceedings were left to continue between the original plaintiff and the Government. Insofar as the Commission was concerned, appellants' connection with the litigation was ended; and that determination of closure was both severed and severable from the final determination of the award to be made to the Western Shoshone Identifiable Group. Cf. *United States v. Fort Sill Apache Tribe*, 205 Ct. Cl. 805, 807-808, 809, 507 F. 2d 861, 863-64, 864 (1974).

⁴In oral argument before the Commission counsel for appellants said (Transcript of Nov. 14, 1974, at 54): "We are trying to intervene. We would like to just reopen that particular question."

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Accordingly, we hold that this court has jurisdiction of the appeal and that the appellants have the right to seek review here. The motion to dismiss the appeal is denied and we proceed to the merits of the appeal.⁵

II.

In passing on the correctness of the Commission's rejection of appellants' petition, we are impressed by two intertwined and striking sets of facts. The first is that that document was first thrust upon the Commission and the parties in 1974, some 23 years after this Western Shoshone claim was first made to the Commission in 1951, some 12 years after the Commission had decided (in 1962) that the United States had extinguished the claimant's title to the large areas involved, eight years after the Commission had approved (in 1966) the parties' stipulation as to the valuation date of these lands, about one and one-half years after the Commission had determined (in October 1972) the actual value of the property, and about a month after the problem of offsets had been tried and submitted for disposition. Thus, the appellants did not seek to put their view before the Commission until after the trial and decision on liability, a separate trial and decision on valuation, and another separate hearing on off-

⁵A separate oral argument was not had on the appeal itself but the parties were expressly given an opportunity to argue the merits during the argument on the motion to dismiss. Appellants did not avail themselves of that opportunity (though the merits were touched on in the Indian appellee's motion to dismiss), but the appeal has since been thoroughly briefed and the court does not deem further oral presentation to be required.

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sets. On this Nevada-land phase of the Western Shoshone claims there was very little left to do; much time had passed, and much had been done.

The second noteworthy fact is that there is no doubt whatever that appellants were for a very long time quite aware of the position with respect to this Nevada land taken before the Commission by appellee Temoak Bands and its counsel. Appellants' petition presented to the Commission on April 18, 1974, said (p. 4): "Petitioners, individual members of the Petitioner Association [appellant Western Shoshone Legal Defense and Education Association], and their predecessors on numerous occasions *over the past thirty-nine years* have resisted any legal action jeopardizing the rights and interests of the Western Shoshone Indians in their tribal lands and have made repeated protests, against the inclusion of such lands in the Claim filed in the above captioned proceeding to the officers of the Temoak Bands of Western Shoshone Indians, the Claims attorneys retained by said organization (see copy of letter from Robert W. Barker attached hereto as Exhibit A) and to representatives of The United States of America" (emphasis added). One of the incidents specifically mentioned occurred in October 1965. In this court in their response to the motion to dismiss the appeal appellants observe (pp. 1-2): "The underlying dispute, which has culminated in this appeal, in reality is, and has for many years, been between appellants (and their predecessors) and the Counsel of Record for the Identifiable Group (and his predecessors). The

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appellants have consistently resisted the inclusion within the Claim, filed in the Indian Claims Commission on behalf of the entire Identifiable Group, lands to which they still assert unextinguished aboriginal title and treaty title for the simple reason that their right to assert title to such lands will be forever barred by operation of 25 U.S.C. 70u" (*see note 2 supra*).⁶

It is in the light of these cardinal facts—(1) that appellants waited so many years to move before the Commission (2) although fully aware of, and opposed to, what was occurring in those proceedings, and (3) without giving any adequate excuse for the long delay—that we must assess their right to come in and participate at the current stage.

As we have already noted, appellants concede that Congress has addressed itself to that question in the Indian Claims Commission Act. Section 10, 25 U.S.C. § 70i, gives the exclusive privilege of pursuing the claim to a recognized tribal organization "unless fraud, collusion, or laches on the part of such organization be shown to

⁶This statement is repeated in appellants' brief on appeal at page 4. That brief also says (pp.13-14): "Repeatedly over the years, at these 'General Councils' [the Councils referred to were held in 1947 and 1959] and elsewhere appellants and other members of the Identifiable Group expressed the concern of the people that pursuing the Claim before the Commission would forfeit their claim of recognized title to the vacant lands within the Treaty boundaries."

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the satisfaction of the Commission." The Commission found in its findings and opinion of 1962 that the Temoak Bands of Western Shoshone Indians, Nevada, was organized under the Indian Reorganization Act of 1934, 48 Stat. 984, and was recognized by the Secretary of the Interior as having authority to maintain a suit. 11 Ind. Cl. Comm. 387, 388. The interlocutory order entered at that time ruled expressly that the Temoak Bands of Western Shoshone Indians, Nevada, has the right to maintain this action for and on behalf of the aboriginal Western Shoshone Identifiable Group, the land-using entity. Section 10 is therefore operative *prima facie*, and appellants must show "fraud, collusion, or laches" (or some comparable justification) in order to displace the Temoak Bands from their role of exclusive representation.⁸

The exception for "fraud" (as separate from "collusion") can be disposed of summarily. Before the Commission appellants did not claim that the Temoak Bands or their counsel had defrauded the other members of the

⁷As it appears in the United States Code, Section 10 reads as follows:

"Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

⁸Appellants do not claim laches on the part of the exclusive representative.

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Western Shoshone Identifiable Group nor did the various proffers of proof made by appellants suggest such fraud. In this court appellants have expanded their argument to include strong intimations that the counsel for the Indian appellees deliberately misled the Indians as to the nature and scope of the Commission proceedings.⁹ But these general allegations are not supported by anything—neither affidavits nor documentation—and they are opposed by affidavits supplied to this court by the Indian appellees. In the absence of some supporting information or detail warranting further inquiries, these belated and unsupported charges of fraud are insufficient to call for a trial or evidentiary hearing. To open up the proceedings, at this late date, on the ground that the bulk of the Identifiable Group has been defrauded requires more than the mere allegations set forth in the briefs in this court.¹⁰ There is no problem of the concealment of the alleged fraud; the asserted “misrepresentations” have long been known to appellants.

As for collusion,¹¹ the Commission found, on the basis

⁹We could refuse to consider these new charges of fraud since appellants failed to present them to the Commission below. *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 435-36, 443-44, 490 F.2d 935, 940, 945 (1974).

¹⁰Plaintiff appellee correctly points out that further delay in the termination of this proceeding may very likely cost the Western Shoshone Identifiable Group a very substantial sum of money since interest does not accrue on an award for the taking of Indian title until the amount is paid. See *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951).

¹¹Before the Commission appellants agreed that they would have to show collusion,” properly interpreted, in order to be allowed to participate in this proceeding.

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of the undisputed record and the appellants' own proffers, that there was no collusion in the conventional sense of that term. We accept and agree with that finding. There was no underhanded agreement, explicit or tacit, between the Temoak Bands and the Government for the former to give up a position more advantageous to the Western Shoshone Identifiable Group or to adopt one more favorable to the Government. What there was in actual fact was a deliberate but unilateral choice in the original petition before the Commission to claim compensation for the “taking” of a very large portion of Nevada land. The Government denied that the Indians ever owned this land or that it owed them any money for the land under the Claims Commission Act. After a trial contested on these grounds, the Commission held that the Western Shoshones held aboriginal title to the territory involved here and that this title was extinguished by a process of gradual encroachment by whites and settlers. Appellants insist that the subject of title-extinction was never tried, going simply by the concurrent agreement of the parties. But evidence on that issue was contained in the materials presented at the 1957 trial and the Indian appellees asked generally for findings that the Shoshone lands had been taken; the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose. The Commission made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by encroachment.

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The parties, instead of having a further trial on the valuation date or dates, then agreed to stipulate that the Nevada lands should be valued as of July 1, 1872, and the Commission accepted this agreement as an implementation of its prior findings of extinguishment. This stipulation was not collusion but a proper application of the admonition that parties to such litigation should attempt to agree, if possible, upon one or a few valuation dates rather than undertake a burdensome individual computation of value as of the date of disposal of each separate tract. *See Creek Nations v. United States*, 302 U.S. 620, 622 (1938); *United States v. Northern Paiute Nation*, 203 Ct. Cl. 468, 473, 490 F. 2d 954, 957 (1974); *United States v. Pueblo of San Ildefonso*, 206 Ct. Cl. —, —, 513 F. 2d 1383, 1391 (Apr. 1975) (slip op. at 12). Appellants gave the Commission and gave us no adequate reason to think that the choice of this particular date was unreasonable or an abandonment of the Indians' true interests.

This determination of no collusion is inevitable under the record of this case. Appellants' proffers to the Commission add nothing which is pertinent, and even if accepted at face value do not call for any change in the conclusion.¹² The same is true of the enlarged allegations of

¹²The proffers before the Commission simply spelled out appellants' legal theory that the Nevada lands still belonged to the Western Shoshone Identifiable Group, asserted that appellants had protested the conduct by plaintiff-appellee of the litigation, asserted generally that the stipulation as to date of taking was prejudicial, said generally that the "Western Shoshone people, through their traditional leaders [i.e. appellants] and by their own individ-

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collusion made to this court, insofar as they should be considered; we have already pointed out that we need not take account of the newly and belatedly interjected charges of fraud on the Indians by counsel for plaintiff-appellee and by officials of the Bureau of Indian Affairs, allegations which are wholly unsupported.

Appellants attempt to avoid this result by arguing that "collusion," in Section 10 of the Claims Commission Act, is not restricted to its normal meaning of an underhanded, non-adversary agreement in derogation of the rights of the Indians but embraces also the presentation of any contention, even without bad faith or improper conduct, by the exclusive representative which happens not to accord with the view of other members of the identifiable group as to the entity's best interests. In this instance, appellants say that there was collusion, as a matter of law, because the exclusive representative urged that the Indians' title had been extinguished—and therefore compensation was due—rather than arguing that the Indians still owned the land under the Treaty of Ruby Valley—and therefore that there was no claim under the Indian Claims Commission Act.

There are two main answers to this point. The first is that there is nothing to indicate that Congress used "collusion" in that expanded and strained sense, far dif-

—
ual actions have continued to assert their common ownership," and alleged that the vast majority of the members of the Identifiable Group "now" desire to have the issue of the current validity of their title determined before an award is paid under the Claims Commission Act.

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ferent from its ordinary connotation. Unless there are good grounds for thinking that the legislature meant an ordinary word to have a special meaning, it is the path of wisdom to follow the normal, common understanding. *Malat v. Riddell*, 383 U.S. 569 (1966); *Richards v. United States*, 393 U.S. 1, 9 (1962); *Selman v. United States*, 204 Ct. Cl. 675, 680, 498 F. 2d 1354, 1356 (1974).

Secondly, appellants' unique understanding of "collusion" would undercut the position of the exclusive representative to which Congress assigned the chief management of the litigation. If "collusion" automatically exists every time a segment of the Indian entity disagrees with the litigating position taken by the exclusive representative, then there is little left to the "exclusive privilege of representing such Indians" granted by the statute to a recognized tribal organization. Congress could not have meant to leave the status of the exclusive representative so vulnerable to attack by any part of the represented group, no matter how minor or uninformed or how often voted down in the internal proceedings of the recognized entity.

But, say appellants, their position is not that of a minority but of the majority of the Western Shoshone Identifiable Group and that majority has had no way of causing the recognized organization, the Temoak Bands, to see the light. In the Commission below, however, appellants did not assert that a majority of the Identifiable Group was opposed to the Temoak Bands' position in 1951 (filing of the claim) or 1957 (hearing on title) or

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1962 (determination of title extinction) or 1966 (stipulation as to date of valuation) or 1967 (trial on valuation) or 1972 (determination of valuation)—the dates of the crucial steps in this proceeding. The only proffer was that the "vast majority of the people comprising the Western Shoshone Identifiable Group *now* desire to have the issue of the validity of their title" (emphasis added) to the Nevada lands determined before the close of Commission proceedings, and even then there was no support for this allegation as to the balance of views in 1974. In this court appellants have apparently widened their proffers to say that a majority was at all times against the position of appellee Temoak Bands.¹³ But again there is no supporting detail, no affidavit, no attempt to make a *prima facie* showing that the allegation is true or at least worthy of an extended inquiry.

We hark back to the long lapse of time before the appellants filed their petition in 1974, and the prejudice to the other parties which occurred because appellants (and those they say they represent) allowed years to go by before they sought to insert their viewpoint into these proceedings. In view of this long and prejudicial delay, it is fair to insist that appellants buttress their allegations

¹³Appellants' brief on appeal says (p. 15): "During the entire proceeding before the Indian Claims Commission, counsel for the Identifiable Group and counsel for the United States failed to inform the Commission that a majority of the members of the Identifiable Group asserts unextinguished aboriginal and recognized title to the lands within the boundaries of the *Treaty of Ruby Valley*."

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by more than self-serving generalities if they are to be accorded a trial.¹⁴

The law furnishes helpful analogies for the proposition that the longer the delay, while pertinent litigation has been going on, the more impressive a showing the latecomer must make to be able to participate in the proceedings or to initiate a new problem. For instance, the longer the delay the easier it is to find laches (where laches applies). *Gersten v. United States*, 176 Ct. Cl. 633, 636, 364 F. 2d 850, 852 (1966). Intervention under Rule 24 of the Federal Rules of Civil Procedure, the intervention rule, is denied where delay is undue and the rights of the original parties may well be prejudiced. *See, e.g., Gerstle v. Continental Airlines, Inc.*, 466 F. 2d 1374, 1377-78 (C.A. 10, 1972); *MacQueen v. Lambert*, 348 F. Supp. 1334, 1335-36 (M.D. Fla. 1972). Also, the law is developing a critical eye toward persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it. *Cf. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968); *Aerojet-General Corp. v. Askew*, 511 F. 2d 710, 718-20 (C.A. 5), *cert. denied*, 96 S. Ct.

¹⁴Section 8(b) of the Commission's General Rules of Procedure calls upon a petitioner challenging the failure of the exclusive representative to take certain action to "set forth with particularity the efforts of the petitioner to secure from the only constituted and recognized officers of said tribal organization such action as he desires and the reasons for his failure to obtain such action (such as fraud, collusion or laches) or the reasons for not making such effort" (emphasis added). The degree of particularity may well depend on the lateness of the application.

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210 (1975); *Gambocz v. Yelencsics*, 468 F. 2d 837 (C.A. 3, 1972). Specifically in Indian Claims Commission Act litigation, this court has held that Tribe W could not intervene in a suit brought by Tribe K, some twenty years after the action was first brought, where the intervention, if allowed, could lead to the defeat of K's claim. "It would work an injustice to allow them to join in a timely filed suit by the Appellees when the result of that intervention may be the defeat of the Appellees' claim, and of any claim." *United States v. Kiowa, Commanche & Apache Tribes*, 202 Ct. Cl. 29, 44-45, 479 F. 2d 1369, 1377-78 (1973), *cert. denied sub nom. Wichita Indian Tribe v. United States*, 416 U.S. 936 (1974). We have also rejected as barred by laches (as well as on other grounds) an independent action, delayed eight years, to set aside a settlement judgment of the Commission. "No adequate excuse for eight years of inaction is offered. If they are lawfully in court now, they could have been here then." *Andrade v. United States*, 202 Ct. Cl. 988, 996-97, 485 F. 2d 660, 634 (1973), *cert. denied sub nom. Pitt River Tribe v. United States*, 419 U.S. 831 (1974).

This general principle that the later a person seeks to enter and disrupt an ongoing litigation the more of a showing he must make impels us, as it did the Commission, to reject appellants' petition. The hour is very late and the showing is not strong. The fact is that at bottom all that appellants have demonstrated is that there is a dispute between an undetermined number of supporters of appellants and the organized entity, the Temoak

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Bands, over the proper strategy to follow in this litigation. The Indian appellees believe it best for all the Western Shoshone Identifiable Group to contend that the Nevada lands involved were "taken" by the United States and that therefore very large amounts of money are due the Identifiable Group for that extinguishment of title. Appellants, on the other hand, believe that the correct course to pursue is to insist that the lands were never taken and are still owned by the Identifiable Group (and putatively more valuable today than in 1872). Both positions entail risk. The Indian appellees run the risk of giving up a claim to continued ownership which, if vindicated, could prove to be worth much more and be more satisfying than an award under the Claims Commission Act. Appellants' risk is the opposite: If they should prove wrong in their claim to continued title they would be too late (absent special congressional action) to seek monetary compensation for the "taking" and would have given up, for nothing, a claim to a very large sum. Certainly the arguments in favor of appellants' position are not overwhelming or clear as day.¹⁵ At the best from their viewpoint the question is an open one which could be decided either way. This is precisely the kind of litigation strategy the statute leaves to the organized representative—unless perhaps there is timely and immediate intercession by the

¹⁵Appellants have sketched their substantive arguments for us in some detail (in the form of a copy of the brief submitted to another forum on those questions). The Commission below, without passing on the issues, indicated its great doubt as to the correctness of appellants' position on the merits. 35 Ind. Cl. Comm. 457, 471-76.

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dissenting group before the proceedings have progressed so far that all parties can properly rely on the litigation position assumed by the organized entity which is the "exclusive" representative.¹⁶

Plaintiffs make some feints against the constitutionality of Section 10's reposing the privilege of exclusive representation in the organized entity (subject to the exceptions for fraud, collusion or laches). But it makes sense for Congress to have taken that position. A claim under the Claims Commission Act is not an aggregation of individual claims but a group claim on behalf of a tribe, band or other identifiable group. *Fort Sill Apache Tribe v. United States*, 201 Ct. Cl. 630, 634-35, 477 F. 2d 1360, 1362 (1973), *cert denied*, 416 U.S. 993 (1974); *Absentee Shawnee Tribe v. United States*, 165 Ct. Cl. 510, 514

¹⁶Appellants' fear, as we have noted, is that payment of the judgment will, under Section 22 of the Claims Commission Act, 25 U.S.C. § 70u, bar the Identifiable Group from thereafter claiming the land as still its own. They say they seek a final determination of this issue of continued ownership before an award is made, and contend that a pending suit in the District Court for Nevada furnishes that opportunity. The Commission refused to stay its proceedings pending resolution of the Nevada action. We think this was a permissible choice on the Commission's part. Postponement of the conclusion of the present proceeding will harm the Indians monetarily if their claim to continued ownership fails. See note 10 *supra*. It may also be noted that the bar of Section 22 does not fall until payment (see note 2 *supra*). If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award. Cf. *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 454-56, 490 F. 2d 935, 951-53 (1974). That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

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(1964); *Cherokee Freedmen v. United States*, 161 Ct. Cl. 787, 788 (1963). The suing claimant represents that group interest, and it is reasonable to say that at least *prima facie* the organized entity "recognized by the Secretary of the Interior as having authority to represent such [claiming] tribe, band, or group" should be the exclusive suing party. An Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward. If there are circumstances in which the organized entity fails properly to represent the group, the normal method of redress is through the internal mechanism of the organized entity. And if there be cases in which that internal mechanism is clogged or unavailable¹⁷ then, at the least, the members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible—and not after much work has been done, and years have passed, on the unchallenged assumption that the organized entity represents the group. To intercede at so late a date requires, at the least, a compelling showing of the kind not made or even attempted here.¹⁸

¹⁷Although claiming to be members of the Western Shoshone Identifiable Group, appellants say that they do not belong to the Temoak Bands and may also be suggesting that they are not eligible to join.

¹⁸In *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 456-59, 490 F. 2d 935, 953-54 (1974), we upheld the Commission's allowing the Little Shell Band to participate in the proceeding as an "identifiable group" along with the Turtle Mountain Band and the Pembina Band. But the Little Shells had

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Finally, we reject, as we have already suggested, appellants' contention that they are entitled to a trial or evidentiary hearing simply because they have raised questions as to whether the Temoak Bands properly represent the Western Shoshone Identifiable Group. Nothing in the Act or the Commission's Rules gives them such an automatic right,¹⁹ and the Commission did not abuse its discretion in holding that the belated petition for intercession did not contain enough of a detailed factual predicate to call for such a hearing. As we have said, the proffers before the Commission could all be accepted *arguendo*, without necessitating a trial or evidentiary hearing, since they were irrelevant to the issues properly posed under Section 10. The additional proffers advanced in this court are inadequate, both because they were not presented to the Commission below and also because, in any event, they are too unsupported and too general to warrant a trial (or evidentiary hearing) this late in the proceedings and after so long a lag in the initial presentation of ap-

participated from the beginning and did not seek to enter in circumstances comparable to the late and conflictual situation present here. The flat statement, in connection with the court's discussion of that question, that "[t]he exclusive right granted [by Section 10] to such an organization extends only to the representation of its own members" (203 Ct. Cl. at 459, 490 F. 2d at 954) was overly broad and is not fully applicable to a case like this in which one organized entity *prima facie* represents the whole ancestral group over many years.

¹⁹Section 17 of the Claims Commission Act, 25 U.S.C. § 70p, calls for "evidence" on the substantive determination of a claim, but does not preclude the Commission from deciding issues such as intervention or participation on the basis of argument and proffers of fact. Similarly, the Commission's Rule 30 requires a trial on such issues only when ordered by the Commission.

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pellants' position to the Commission. Appellants tell us that they think they can make their case through the discovery mechanism but, at this point in the proceedings, it is far too late to hope that proof will be obtained through discovery; to upset the applecart after the fruit has been so carefully collected and piled, appellants would have to possess already, and to present, some hard proof justifying the disruption and turn-about in position they seek to require.

The Commission did not err in rejecting appellants' petition to present an amended claim and for a stay of the proceedings.

Affirmed

Supreme Court, U. S.
FILED

SEP 29 1976

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No. 76-90

In the Supreme Court of the United States

OCTOBER TERM, 1976

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION
ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 28a-50a) is reported at 531 F. 2d 495. The opinion and order of the Indian Claims Commission (Pet. App. 1a-27a) is reported at 35 Ind. Cl. Comm. 457.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1976. A timely motion for rehearing and for rehearing *en banc* was denied on April 23, 1976. The petition for a writ of certiorari was filed on July 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Indian Claims Commission properly denied petitioners intervention before the Commission

(1)

to file an amended claim contrary to the claim presented by the authorized representative of the Western Shoshone Identifiable Band or Group.

STATUTE INVOLVED

Section 10 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1052, 25 U.S.C. 70i, provides:

Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but whenever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

STATEMENT

1. *History of the litigation prior to the appearance of petitioners.*

On August 10, 1951, the Temoak Bands of Western Shoshone Indians (the original plaintiff) filed claims before the Indian Claims Commission on behalf of the Western Shoshone Identifiable Band or Group.¹ One

¹These claims were assigned Docket No. 326 before the Indian Claims Commission. The claim which is the subject of the present petition was subsequently severed from the original claims and assigned Docket No. 326-K. Order Allowing Severance of Claims, entered by the Indian Claims Commission on August 16, 1967. The original petition filed in 1951 presented claims on behalf of several groups of Shoshone Indians. Docket 326-K deals only with those filed on behalf of the Western Shoshone Identifiable Group.

claim sought compensation for the extinguishment of title to lands aboriginally used and occupied by the Western Shoshone Indians. This claim was tried in August and September 1957 and, on October 16, 1962, the Commission entered an opinion, findings of fact and order holding that the Western Shoshone Indians had held Indian title to 24,396,403 acres of land in the present states of California and Nevada and that the United States had extinguished this title without compensation. *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm. 387, 413-414.

In September 1967, the parties proceeded to trial to determine the fair market value of the Western Shoshone lands.² On October 11, 1972, the Commission entered further findings of fact and an opinion and order awarding the Western Shoshone Identifiable Group \$21,550,000 plus \$4,604,600 as compensation for minerals removed prior to the valuation date. *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 124. A third trial was held in October 1973, regarding the setoffs claimed by the United States.³ By March 5, 1974, the setoff issues had been fully briefed by the United States and the Western Shoshone Identifiable Group and had been submitted to the Commission for decision.

²The parties stipulated to the date of valuation, and the Commission approved the chosen date. Order Approving Joint Stipulation as to Date of Valuation, entered on February 11, 1966.

³Indian land claims before the Indian Claims Commission are regularly tried in three separate phases: (1) liability or determination of title, (2) valuation and (3) setoff claims by the United States.

2. The appearance of petitioners.

Petitioners, who are members of the Western Shoshone Identifiable Group, appeared for the first time on April 18, 1974, almost 23 years after the original petition was filed, asking leave pursuant to 25 U.S.C. 70i to present an amended claim on behalf of that Group.⁴ Petitioners sought intervention to prove that, contrary to the prior decision of the Indian Claims Commission, the Indian title to portions of the Western Shoshone ancestral lands had not been extinguished.⁵ The Commission denied petitioners' request (Pet. App. 1a-27a), and the Court of Claims affirmed (Pet. App. 28a-50a).

ARGUMENT

1. Petitioners contend that the exclusive representation provisions of the Indian Claims Commission Act, 25 U.S.C. 70i, deprived them of due process.

The Indian Claims Commission Act provides that "whenever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent [an Indian tribe, band, or other identifiable group of Indians], such organization shall be accorded the exclusive privilege of representing such Indians * * *." 25 U.S.C. 70i. This requirement is rationally designed to prevent litigation under the Act from becoming burdened by numerous claimants and attorneys and is

⁴Petitioners' document was entitled Petition to Stay Proceedings and for Leave to Present Amended Claim by the United Western Shoshone Legal Defense and Education Association and Frank Temoke.

⁵Petitioners claim that title has not been extinguished to some 12 million acres of the 24,396,403 acres which the Commission found had been held by the Western Shoshone but to which title had been extinguished. Transcript of Oral Argument before the Commission held on November 14, 1974, at 47.

a permissible condition on the waiver of sovereign immunity. See *Ex parte Bakelite Corporation*, 279 U.S. 438, 452; *Schillinger v. United States*, 155 U.S. 163, 166.

Petitioners nonetheless argue that representation by the Temoak Bands in this case nullified "the contrary interests of the remainder of the Identifiable Group" (Pet. 12) and that litigation before the Commission must be conducted in the same manner as class actions (Pet. 11-12). But claims presented under the Indian Claims Commission Act, unlike class action claims, are not individual claims. See 25 U.S.C. 70a; *Fort Sill Apache Tribe v. United States*, 477 F. 2d 1360, 1362 (Ct. Cl.), certiorari denied, 416 U.S. 993; *Absentee Shawnee Tribe v. United States*, 165 Ct. Cl. 510, 514. The rights conferred by aboriginal title belong to the Tribal group, not to its individual members. *Prairie Band of Potawatomi Indians v. United States*, 165 F. Supp. 139, 147 (Ct. Cl.). Thus the due process cases petitioners cite (Pet. 12), all of which deal with adequate representation of individual rights, are not pertinent.

Moreover, the Commission has recognized the Temoak Bands as the exclusive representative of the Western Shoshone for this litigation since 1962, the same time it held that the United States had extinguished the Indian title to over 24 million acres of land (11 Ind. Cl. Comm. 387). Petitioners did not appear to challenge either finding at that time or during the subsequent 12 years. Although they now claim that the Temoak Bands do not represent a majority of the Western Shoshone, that position was not even urged before the Commission and,

in any event, is not supported by the record in this case (Pet. App. 42a-43a).⁶

2. Petitioners also contend that the Temoak Bands and the United States engaged in collusion to deprive the Western Shoshone of continued title to 12 million acres of land.

An exception to the provision for exclusive representation is made when "fraud, collusion, or laches on the part of such organization [is] shown to the satisfaction of the Commission." 25 U.S.C. 70i. Petitioners apparently urge (Pet. 12) that collusion is shown whenever the exclusive representative takes a litigating position that does not conflict with the position taken by the government.⁷ But collusion "implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful

⁶Petitioners did not challenge below the right of the original plaintiff to represent the Western Shoshone Identifiable Group absent collusion. Memorandum in Opposition of Government's Motion to Dismiss Petition by United Western Shoshone Legal Defense and Education Association and Frank Temoke filed before the Commission on May 13, 1974, at 9-10.

⁷In its legal memorandum on this issue, petitioners stated: "The question before the Commission then is whether it constitutes 'collusion,' within the meaning of Section 10 of the Indian Claims Commission Act for the representative body to present a claim, which is adverse to the legal interests of members of the identifiable group it represents and which, instead, supports the legal position of the defendant on that issue." Petitioners' Memorandum on Issue of Collusion filed before the Indian Claims Commission on November 7, 1974, at 12-13. Petitioners now suggest (Pet. 13) that they 'should have been granted a hearing to determine whether collusion (in the accepted sense) was present. The Court of Claims correctly held that petitioners' allegations were "too unsupported and too general to warrant a trial (or evidentiary hearing)" (Pet. App. 49a).

purpose * * *." *Dickerman v. Northern Trust Company*, 176 U.S. 181, 190. It would be inappropriate practice under the Indian Claims Commission Act to make intervention by nonrepresentative litigants the price of agreement between the representative ones. As the Court of Claims noted (Pet. App. 42a), petitioners' theory "would undercut the position of the exclusive representative to which Congress assigned the chief management of the litigation."⁸ There is nothing in the statute or legislative history to show that Congress meant to use the term "collusion" in this strained sense; in the absence of such clear intention, the ordinary meaning of the term should apply (*Richards v. United States*, 369 U.S. 1, 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

⁸The Court of Claims noted (Pet. App. 46a) that choice of legal theory "is precisely the kind of litigation strategy the statute leaves to the organized representative * * *." In addition, both the Commission (Pet. App. 16a-21a) and the Court of Claims (Pet. App. 46a) expressed doubt about the merits of petitioners' position.

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v.

THE UNITED STATES OF AMERICA, AND THE WESTERN
SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE
TEMOAK BANDS OF WESTERN SHOSHONE INDIANS,
NEVADA,

Respondents.

**BRIEF IN OPPOSITION FOR RESPONDENT,
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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1976

No. 76-90

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION
 ASSOCIATION, AND FRANK TEMOKE,
Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE WESTERN
 SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE
 TEMOAK BANDS OF WESTERN SHOSHONE INDIANS,
 NEVADA,

Respondents.

**BRIEF IN OPPOSITION FOR RESPONDENT,
 THE WESTERN SHOSHONE IDENTIFIABLE GROUP**

Respondent, Western Shoshone Tribe or Identifiable Group, prays that the petition be dismissed as raising no special or important issues worthy of consideration by this Court, the unanimous decisions below being entirely consistent with established federal law governing tribal claims.

OPINIONS BELOW

The opinion of the Indian Claims Commission is reported at 35 Ind. Cl. Comm. 457 and is set forth at page 1a of the Appendix to the petition. The opinion of the

United States Court of Claims affirming the decision of the Indian Claims Commission is reported at 209 Ct. Cl. 43, 531 F.2d 495 (1976), and is reproduced at page 28a of the Appendix to the petition.¹

JURISDICTION

Jurisdiction of this Court should properly have been invoked pursuant to the provisions of 28 U.S.C. § 1255 (1), not 23 U.S.C. § 1225(1) as stated in the petition.

QUESTION PRESENTED

Whether there was a denial of due process by refusal of the Indian Claims Commission to permit intervention by dissenting individual members of an identifiable Indian group (the "Identified Group") for the purpose of amending the claim of the Identified Group under the following factual circumstances:

1. The claim asserted is a tribal claim, not an aggregate of individual claims or a class action;

2. Intervention was sought immediately prior to entry of a final judgment of in excess of \$26,000,000 in an aboriginal title land claim involving 24 million acres and after about 23 years of actual litigation by the Identifiable Group;²

¹ An order dated April 23, 1976, in which the Court of Claims (six active judges) denied the petitioners' motion for rehearing *en banc*, is printed as an Appendix to this Brief in Opposition. All references to the Appendix of the petition will be "App." Citations to the Appendix of this Respondent's Brief will be "R.App."

² The sole purpose of intervention was to amend the tribal claim to exclude (and waive compensation for) an estimated 12 million acres of land (App. 30a). The land has never been precisely identified by petitioners, who contend Indian title has not been extinguished to large areas even though aboriginal possession no longer continues.

3. The claim (a) has been prosecuted, with full knowledge of and notice to the dissidents, for over thirty years under a contract of employment of counsel approved by and renewed by general membership meetings of the Identifiable Group, (b) has been asserted on behalf of the Group by a recognized organized constituent tribe, and (c) has been supervised by a Claims Committee elected by and representative of the general membership of the Group;

4. The dissidents have, over many years, despite repeated efforts, failed to convince the members of the Group in various general council meetings to adopt their litigation strategy to delete the several million acres of land or withdraw the claim; and

5. The only ground alleged below for intervention under Section 10 of the Indian Claims Commission Act is "collusion",³ which the Indian Claims Commission found did not occur.⁴

STATUTE INVOLVED

"70i. Presentation of claims.

"Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having au-

³ Section 10 grants a recognized tribe the exclusive authority to represent the tribe, band or group, "unless fraud, collusion or laches on the part of such organization can be shown to the satisfaction of the Commission." 25 U.S.C. § 70(i).

⁴ The Commission found the contentions on collusion "untenable" (App. 8a) and that instead of an alleged collusive agreement of the parties as to extinguishment of Indian title, as charged, the extinguishment had been found as a fact by the Indian Claims Commission in 1962 after full evidentiary hearings. (App. 9a-12a). The Court of Claims reached the same conclusion. (App. 29a).

thority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission." (Indian Claims Commission Act of Aug. 13, 1946, c. 959, § 10, 60 Stat. 1052, 25 U.S.C. § 70i.)

STATEMENT

On August 10, 1951, the Western Shoshone timely filed a petition in the Indian Claims Commission alleging, among other things, their aboriginal ownership or occupancy of certain lands in Nevada and California and also that title had been recognized by the Treaty of Ruby Valley of October 1, 1863 (18 Stat. 689) (App. 5a-6a).⁵ The Identifiable Group also claimed that these lands had been disposed of by the United States to settlers or otherwise seized and converted to the use of the government without compensation or under circumstances that did not constitute fair and honorable dealings (App. 6a). The Western Shoshone sought just compensation for the taking of their land and the resulting loss of the use thereof. (App. 6a, 29a).

⁵ Commencing in the early 1930's, the Western Shoshone had hired the late Milton A. Badt, subsequently Chief Justice of the Nevada Supreme Court, to seek jurisdictional legislation to permit assertion in the Court of Claims of claims for compensation for their ancestral land. See, e.g., S. 2510, 74th Cong., 1st Sess. (1935) (a bill to authorize the Western Shoshone Indians to sue in the Court of Claims); H.R. 9035, 73d Cong., 2d Sess. (1934) (a bill for relief of the Western Shoshone Nation by conferring jurisdiction on the Court of Claims to hear and adjudicate certain claims and to pay compensation for the 1863 Treaty lands). See also S. 23, 78th Cong., 1st Sess. (1943); H.R. 4748, 77th Cong., 1st Sess. (1941); S. 12, 77th Cong., 1st Sess. (1941); S. 2670, 76th Cong., 1st Sess. (1939); S. 68, 75th Cong., 1st Sess. (1937). In the summer of 1947, a General Council of the Western Shoshone (including the Temoak Band) was held to approve an employment contract to authorize legal counsel to assert claims under the Indian Claims Commission Act, a purpose at direct variance with petitioners' present effort. Members of the dissident petitioning group were aware of these actions of the Identifiable Group at the time.

The Group's claim was initiated after full discussion with all interested Western Shoshone and pursuant to an attorney employment contract authorized by a general membership meeting of the entire Identifiable Group.⁶ This meeting was widely publicized and was well attended by members of the Identifiable Group.

In its answer, the United States denied that the Western Shoshone had aboriginal or recognized title or that such title had been extinguished and, after a lengthy trial in 1957 on the title phase of the case was concluded, the Commission in 1962 unanimously determined (1) that the Western Shoshone aboriginally used, occupied and possessed a defined area of land and (2) that its title had been maintained until

"by gradual encroachment by whites, settlers and others, and by the acquisition, disposition and taking of their lands by the United States for its own use and benefit, or the use and benefit by its citizens, the way of life of these Indians was disrupted and they were deprived of their lands."⁷

⁶ The use of a general membership meeting, or "general council" as it is sometimes called, is a well-known and commonly used process and is specifically authorized by 25 C.F.R. § 72.8 (1975), which calls for selection of counsel by a "general council or meeting of the tribe." The petitioners are, and always have been, full members of the Identifiable Group and, therefore, have enjoyed numerous opportunities to present their political opinions regarding the handling of this case at the several general council meetings held on this matter. It should also be noted that the attorney employment contracts were signed by representatives of the entire Identifiable Group, not merely the Temoak Bands, and that a Claims Committee was elected by the entire Identifiable Group to oversee the litigation strategy adopted by the claims attorneys. These facts, in addition to the 25 years of delay in the filing of petitioners' motion to amend the petition, clearly distinguish the instant situation from the facts presented to the Court of Claims in *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 490 F.2d 935 (1974). This basic difference was correctly noted by the lower court. 531 F.2d at 504, n. 18 (App. 48a-49a).

⁷ *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962). See App. 10a-12a.

The Commission also determined in 1962 that the Temoak Bands of Western Shoshone Indians, suing on behalf of the entire Western Shoshone Identifiable Group, had been duly authorized and recognized by the Secretary of the Interior to maintain this suit on behalf of the entire group.⁸

After the 1962 decision of the Indian Claims Commission, general council meetings involving the entire Western Shoshone Identifiable Group were again held. At these widely publicized meetings, detailed reports were given to the Indians on the status and consequences of the pending claims at the Commission. After full discussion of this subject, the members of the Identifiable Group voted overwhelmingly to continue prosecution of the claims at the Commission and even to borrow thousands of dollars to finance certain expert witness testimony necessary to prove the value of certain surface and mineral rights.⁹

Subsequent to the 1967 trial on valuation, the Commission, in 1972, unanimously awarded the Identifiable Group \$26,154,600 subject to allowable offsets.¹⁰ After

⁸ 11 Ind. Cl. Comm. at 388. It should be noted that during this trial, which lasted nearly two months, more than 530 exhibits (including books, maps, historical, anthropological and political documents) plus the detailed testimony of several expert witnesses were presented for the Commission's consideration.

⁹ Affidavits of Arthur T. Manning and William McQueen, Chairman and Member of the Western Shoshone Claims Committee. (This respondent presented two affidavits as appendices 2 and 3 to its November 21, 1975 brief to the Court of Claims on the issue of collusion. These affidavits are hereinafter cited as Manning Affidavit or McQueen Affidavit.) Over the years, the dissenters repeatedly proposed seeking restoration of the land in lieu of the claim for compensation, and their proposal was rejected. Manning Affidavit, p. 2.

¹⁰ *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 58 (1972). The Nevada lands for which the Western Shoshone held aboriginal title were valued by the Commission as of

its motion for rehearing was denied in 1973,¹¹ the government filed its proposed offsets to the award. The offsets issues were tried and submitted to the Commission for its decision by March 5, 1974.¹²

Despite the fact that all of the foregoing proceedings and decisions were widely publicized and known to all members of the Western Shoshone Identifiable Group,¹³ it was not until April 14, 1974 that the petitioners took any formal steps to intervene in this case. On that date (some 23 years after the original petition was filed and 12 years after the Commission had independently de-

July 1, 1872, pursuant to a stipulation entered into by the parties at the invitation of the Commission. See 35 Ind. Cl. Comm. at 469 (App. 12a-13a). It is this stipulation which formed the basis of petitioners' initial allegations below that the duly authorized representative of the Identifiable Group and the United States had "colluded" to treat the Western Shoshone land as "taken" by the government. However, this stipulation had nothing whatsoever to do with the issue of whether the Western Shoshone's property had been "taken" or title had been extinguished. Indeed, the Commission had already independently determined that such a taking and extinguishment of title had occurred, but was unable to "definitely set the date of acquisition of these lands by the United States" without further proof or stipulation. 11 Ind. Cl. Comm. at 416. Use of such a stipulated "average" date of taking for valuation purposes is not unique to this case. See *United States v. Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 663-64, 513 F.2d 1383, 1391 (1975); *United States v. Northern Paiute Nation*, 203 Ct. Cl. 468, 473, 490 F.2d 954, 958 (1975). This procedure, utilizing an average date for valuing property taken by the United States in piecemeal fashion, has the express sanction of this Court. See *Creek Nation v. United States*, 302 U.S. 620, 622 (1938).

¹¹ *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 472 (1973).

¹² Although the Commission has been prepared to render its opinion on the offsets phase of the litigation for some time, its decision has been stayed solely because of the delay caused by petitioners' appeals.

¹³ See Manning and McQueen Affidavits. The Court of Claims reviewed the full awareness of petitioners of developments in the case through its various steps (App. 35a-37a).

terminated that Indian title had been extinguished) a small group of unauthorized individuals calling themselves the "United Western Shoshone Legal Defense and Education Association" and Frank Temoke, filed a motion to stay the proceedings and for leave to amend the 1951 petition so as to exclude approximately 12 million acres covered by the Commission's award. Their desire to amend the petition was based on the novel theory that, since Indian title had not been extinguished by a formal Act of Congress, the Identifiable Group still owns the lands in Nevada held aboriginally by the Western Shoshone.¹⁴

¹⁴ It should be noted that petitioners' theory goes directly contrary to the numerous holdings by this Court and the Court of Claims to the effect that Indian title is extinguished by loss of possession and that no Act of Congress is required. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281-82 (1955); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Pillager Bands of Chippewa Indians v. United States*, 192 Ct. Cl. 698, 704, 428 F.2d 1274, 1277 (1970); *Sac & Fox Tribe of Indians v. United States*, 161 Ct. Cl. 189, 201-02, 315 F.2d 896, 903, cert. denied, 375 U.S. 921 (1963). There is no doubt that the land under question has been converted to grazing districts, school lands and national forests, all of which have been held to be dispositions extinguishing title. See *United States v. Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 654, 513 F.2d 1383, 1386 (1975); *Tlingit & Haida v. United States*, 147 Ct. Cl. 315, 339-41 (1959); *Pueblo de Zia v. United States*, 19 Ind. Cl. Comm. 56, 74-79 (1968).

This Court has upheld a prior Court of Claims finding that the 1863 Shoshone treaties were treaties of peace and amity and not treaties of recognition or acknowledgement of Indian title by the United States. *Shoshone Indians v. United States*, 324 U.S. 340, 354 (1945). Motion to recall and amend the mandate denied. *Northwestern Bands of Shoshone v. United States*, 325 U.S. 840 (1945). (The Northwestern and Western treaties were two of five treaties negotiated by the United States at about the same time, with the same purpose and pursuant to the same authority and instructions.) In *Northwestern Shoshone Indians v. United States*, 95 Ct. Cl. 642, 676 (1942), the court, in rejecting a claim of recognition, said: "On the contrary, the United States has ever exercised dominion and complete ownership over the territory. . . ."

It is, therefore, not surprising to find that the Commission viewed petitioners' underlying legal theories totally void of merit.

In order to obtain standing to intervene in this action before the Commission, petitioners alleged that "collusion", as used in Section 10 of the Indian Claims Commission Act, had occurred between the authorized representative of the Identifiable Group and the government to treat the title to the lands as extinguished rather than as still held by the Indians.¹⁵ Realizing that no collusion had ever occurred as this term has always been defined, petitioners argued that, for the purposes of the Indian Claims Commission Act, "collusion" should include *any* position taken by the duly authorized representative of the Identifiable Group with which the petitioners disagreed. The Commission, after hearing more than two hours of argument, concluded that petitioners' reading of Section 10 was faulty and that their contentions of collusion were totally unfounded as a matter of law.¹⁶ Therefore, the Commission dismissed petitioners' untimely motion to stay the proceedings and amend the petition.

See 35 Ind. Cl. Comm. at 471-76 (App. 16a-21a). The Court of Claims also had grave misgivings about petitioners' substantive arguments. *Western Shoshone Legal Defense & Education Ass'n v. United States*, 531 F.2d at 503 (Ct. Cl. 1976) (App. 46a).

¹⁵ See n. 3, *supra*.

¹⁶ While petitioners argue that the Commission denied them an evidentiary hearing (Petition, at 6), in fact, both the Indian Claims Commission and the Court of Claims invited petitioners and gave them ample opportunity to show what the evidence would prove. The Commission treated the motion as equivalent to a motion for rehearing (App. 7a) and concluded that the petition was "unsupported by any data which would justify reopening or rehearing. . ." (App. 8a). The Court of Claims found on the "basis of the undisputed record and appellants' own proffers" that the Commission's conclusion that there was no collusion was a valid finding. (App. 38a-39a). It held that even if petitioners' proffers to the Commission were accepted at face value, they do not call for a change in conclusion (App. 40a, 49a). The Court of Claims held that the proffers made to the court were "too unsupported and too general to warrant a trial (or an evidentiary hearing)." (App. 49a).

Petitioners were given an additional opportunity in the Court of Claims to argue their strained interpretation of Section 10 of the Act and to demonstrate their ability to show the alleged "collusion". The Court of Claims affirmed the Commission's dismissal, holding generally that the terms of Section 10 should be given their ordinary meaning and connotation and specifically that the "determination of no collusion is inevitable under the record of this case."¹⁷

Petitioners' motion for rehearing *en banc* was reviewed by the court and was unanimously dismissed.¹⁸

ARGUMENT

Petitioners' attack upon the constitutionality of the long established procedure under the Indian Claims Commission Act does not raise any question of substance which merits consideration by this Court.¹⁹ Petitioners' claim to a denial of due process is founded upon a misconception of the nature of a tribal claim, which they believe is similar to a class action under Rule 23 of the Federal Rules of Civil Procedure. As the Court of Claims correctly stated in its opinion: "A claim under the Claims Commission Act is not an aggregation of individual claims but a group claim on behalf of a tribe, band or other identifiable group."²⁰ Unlike tribal or group claims before the Commission, class actions are based on separable individual rights of the members of

¹⁷ 531 F.2d at 501 (App. 40a). The court also summarily disposed of petitioners' new and totally unsubstantiated allegations of "fraud", allegations which had not been made to the Commission. 531 F.2d at 499-500 (App. 38a).

¹⁸ R. App., *infra*.

¹⁹ There is no similar case pending under the Act and no suggestion of judicial conflict.

²⁰ 531 F.2d at 503 (App. 47a).

the class. In contrast, no individual member of an Indian tribe or group possesses any property right in a claim dealing with the group's title to land, separable from the right of the entity.²¹ Thus, petitioners' "Questions Presented" totally misstate what is involved in this case, since they are premised on the notion that individual members of the Identifiable Group possess "property interests" in the Group's claim. (See *Petition*, at 2-3).²²

Indeed when separate individual rights of Indian claimants are at stake, the Court of Claims has insured that

²¹ See *Prairie Band of Potawatomi Indians v. United States*, 143 Ct. Cl. 131, 143, 165 F. Supp. 139, 147 (1958). See also *Fort Sill Apache Tribe v. United States*, 201 Ct. Cl. 630, 634-35, 477 F.2d 1360, 1362 (1973), *cert. denied*, 416 U.S. 993 (1974); *Absentee Shawnee Tribe v. United States*, 165 Ct. Cl. 510, 514 (1964). As the Court of Claims has clearly pointed out in the past:

"The unbroken rule of law from *Johnson v. M'Intosh*, 8 Wheat. 543, to date is that Indian title, unrecognized by the United States by treaty or patent, covers the right to use only. . . . This right to use the land is, however, the property of the band, tribe or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. No instance is known of individual ownership of tribal lands." 143 Ct. Cl. at 143, 165 F. Supp. at 147.

²² None of the representative or class action cases cited by petitioners is applicable to the present tribal claim proceeding, since individual members of the Group possess no separable, distinct property rights in the tribal land. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), essentially involved this Court's construction of the language and meaning of Rule 23 notice requirements for class actions. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), reasonable notice and an opportunity for hearing were held to be prerequisites to any potential deprivation of separable property rights possessed by trust beneficiaries. Finally, this Court in *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), merely recognized the binding effect of a judgment upon absent parties where they were adequately represented in a proceeding or where the various members' property interest was joint.

the absent parties' interests are adequately being represented in court. See *Quinault Allottees Ass'n v. United States*, 197 Ct. Cl. 134, 137, 453 F.2d 1272, 1275 (1972).

Petitioners misrepresent the opinion below when they assert that it was based on the doctrine of laches. Simply stated, the opinion by the Court of Claims involved a technical interpretation of statutory construction, the court correctly determining that, since petitioners had failed to demonstrate a contrary congressional intent, the words found in Section 10 of the Indian Claims Commission Act should be given their "ordinary connotation" and nothing more. See 531 F.2d at 501 (App. 42a). By adopting the normal meaning of the language of Section 10, as respects the word "collusion", the lower court merely followed this Court's oft-repeated maximum of statutory construction that "the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Malat v. Riddell*, 383 U.S. 569, 571 (1966). See also *Hanover Bank v. Commissioner*, 369 U.S. 672, 687-88 (1962); *Richards v. United States*, 369 U.S. 1, 9 (1962); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). Clearly, had the bar of laches truly been invoked against petitioners, the court would have had no reason to consider, as it did, the merits of petitioners' strained interpretation of the Act or its unsupportable allegations of "collusion" on the part of the duly authorized representative of the Western Shoshone Identifiable Group.²³

²³ The court's recognition of the inordinate delay in petitioners' attempt to intervene in this proceeding should be placed in its proper context. Its discussion in this regard related directly to whether the completion of the Identifiable Group's litigation should further be postponed by allowing petitioners a full trial on their unsupportable "collusion" allegations. The court concluded that:

"[i]n view of this long and prejudicial delay, it is fair to insist that appellants buttress their allegations by more than

The third "question" presented in the petition is also faulty and deceptive when it states that "the delay cited is 23 years of efforts by claims counsel to achieve a different result than desired by the Indian beneficiaries." As demonstrated clearly by this respondent, both to the Indian Claims Commission and to the Court of Claims, this allegation not only misstates the facts but also makes little sense.

The 23 years of efforts and expenditure of thousands of dollars was by the Identifiable Group and under supervision of its Claims Committee and general council meetings. It was not a solo effort of counsel.

In its true perspective, petitioners' complaint in this case is that, although afforded numerous opportunities in the past, they have been unable to persuade a majority (or even close to a majority) of the Western Sho-

self-serving generalities if they are to be accorded a trial." 531 F.2d at 502 (App. 43a-44a).

The Court of Claims understood that petitioners had been given ample notice and opportunity to attempt intervention at a much earlier date and that, in view of the worthlessness of petitioners' arguments, additional time expended on their frivolous claims would be a complete waste of judicial time and would cause enormous financial harm to the entire Identifiable Group. In this regard, the court pointed out that:

"[F]urther delay in the termination of this proceeding may very likely cost the Western Shoshone Identifiable Group a very substantial sum of money since interest does not accrue on the award for the taking of Indian title until the amount is paid." 531 F.2d at 500, n. 10 (App. 38a), citing *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951).

The loss of interest to the Western Shoshone caused by the delay resulting from petitioners' frivolous motion to intervene has been estimated at \$2,092,368 per year, \$174,364 per month, or \$5,812 per day. The Court was not unmindful that to "upset the apple cart" (App. 50a) and to send the Identifiable Group back to "start" with its valuation proceeding, by elimination of about 12 million acres from the claim, would cause it to start over again at the point it was in 1962, some 14 years ago.

shone Identifiable Group to follow their political conception of the proper method to handle the prosecution of the Group's litigation. Obviously, had petitioners been successful in their political attempts, they would have possessed the votes to direct the claims attorneys to follow a course of action different from that initially chosen by the Group prior to 1951 and ratified at various dates since that time. The failure by petitioners to obtain political power within the Identifiable Group is not an issue which merits consideration by this Court.

It should be remembered that petitioners' unfounded allegations have been carefully considered first by five members of the Indian Claims Commission and subsequently by six judges at the United States Court of Claims. Each of these individuals has substantial experience dealing with the technical aspects of Indian claims litigation. Consistent with ample case precedents both tribunals have correctly determined, *without dissent*, (1) that the language of Section 10 of the Act should be read to mean exactly what it says and (2) that petitioners' totally unsubstantiated allegations of "collusion" fail to show the reasonable requisites for their intervention in this claim by the Identifiable Group. The fact that petitioners disagree with the unanimous decisions against them is no valid reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

1a

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

App. No. 3-75

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION
ASSOCIATION AND FRANK TEMOKE

Appellants

v.

THE UNITED STATES

and

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA

Appellees

Before DAVIS, *Judge*, Presiding, SKELTON and KUNZIG, *Judges*.

ORDER

This case comes before the court on appellants' motion, filed March 8, 1976, for rehearing *en banc* pursuant to Rules 7(d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, filed March 16, 1976, by the appellee, Western Shoshone Identifiable Group, without oral argument, by the six active Judges of the court (Judge Kashiwa not participating) as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

2a

IT IS ORDERED that appellants' said motion for rehearing, filed March 8, 1976, be and the same is denied.

BY THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

Apr. 23, 1976

Supreme Court, U. S.
FILED
OCT 5 1976
MICHAEL RQDAK, JR., CLERK

**In the Supreme Court of the
United States**

OCTOBER TERM, 1976

No. 76-90

**WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION
ASSOCIATION, AND FRANK TEMOKE,**

Petitioners,

vs.

**THE UNITED STATES OF AMERICA, AND THE WESTERN
SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE
TEMOAK BANDS OF WESTERN SHOSHONE INDIANS,
NEVADA,**

Respondents.

**PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION FOR
RESPONDENT, THE WESTERN SHOSHONE IDENTIFIABLE
GROUP REPRESENTED BY THE TEMOAK BANDS**

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Attorney for Petitioners

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The brief filed by the attorney for the Respondent, Western Shoshone Identifiable Group, opposing the Petition before the Court is inappropriate in the extreme as it is based entirely upon alleged facts which were disputed below in the pleadings, proffers of proof and affidavits submitted by Petitioners. Since Petitioners were denied a hearing on these disputed facts, it would seem axiomatic

that these allegations cannot be considered by the Court in deciding whether to grant the Petition for Certiorari.

The thrust of the brief filed by the claims attorney is that the entire Identifiable Group to which Petitioners belong is actually in control of the claim through a "claims committee" which was democratically elected, and hence Petitioners did have input, but failed only because they are a small minority who cannot persuade their fellow tribesmen. While Petitioners do not concede that they would not still be entitled to a hearing even if such allegations were true, Petitioners have claimed that those allegations were false. The only evidence in support of those allegations were the two affidavits of members of the "claims committee" which were attached to the claims attorney's brief *on appeal* to the Court of Claims. Petitioners submitted a counter affidavit by another member of the "claims committee", who was also a former Chairman of the Temoak Bands Business Council (the exclusive representative plaintiff), to the effect that: (1) The "claims committee" was formulated after the Temoak Bands Business Council refused to approve a loan on behalf of the entire Identifiable Group because they recognized they represented only a minority of the Group; (2) that the members of the "claims committee" were elected at meetings by small minorities after the majority

¹This affidavit was not submitted until the Petition for rehearing because counsel for the Petitioners did not believe submission of affidavits on appeal was proper under the rules until the Court of Claims complained that there were no counter affidavits. Petition, App. 38a. It should be remembered that the Indian Claims Commission denied Petitioners the opportunity to submit affidavits.

of Western Shoshones walked out of the meetings in protest of the handling of the claim by the claims attorney; (3) that these elections were conducted with no precautions against unauthorized persons voting or against one person voting at more than one meeting; (4) that the "claims committee" acted initially under the domination of the claims attorney and actually did not make its own decisions; (5) that the "claims committee" in 1975, attempted to direct the claims attorney to remove lands from the claim and were refused; (6) that on other occasions the claims attorney ignored requests of the "claims committee"; (7) that the "claims committee" has never had any by-laws or other procedural rules and the members did not have specific periods of tenure; (8) that affiant disputed the claims in the opposing affidavits that a majority of the Group supported the claim; and (9) that the Western Shoshone People never were afforded an opportunity to decide whether to include lands in the claim or to attempt to retain title to them.

It should be stressed that the Court of Claims below did not base its decision on the legitimacy of the "claims committee", but throughout its decision assumed that the Temoak Bands was in control of the litigation, in fact that Court held that Temoak Bands was the *exclusive* representative having control over the litigation strategy. Petition, App. 46a-47a. It is this holding, that the Temoak Bands, a small part of the entire Identifiable Group, can give up the property rights of the entire Identifiable Group without the Indian Claims Commission according

a hearing to the remainder of the Group, which Petitioners are asking this Court to review.

In his brief opposing the Petition, the claims attorney also inappropriately attacks the substantive legal theory of Petitioners regarding the Western Shoshone claim of aboriginal and treaty title. Again, since Petitioners were not accorded a hearing on this issue before the Indian Claims Commission, it is not procedurally proper to raise it at this stage of the proceedings.² While the opinion, supporting the order of dismissal of the Indian Claims Commission below, did discuss what the Commission (incorrectly) supposed the substantive theory of Petitioners to be, such discussion acknowledged that the issue of extinguishment of title was not before the Commission. Petition, App. 16a. Because of that lengthy dictum concerning the substantive issue contained in the opinion of the Commission, Petitioners submitted to the Court of Claims a brief on the question. The Court of Claims, correctly, did not rule on the merits of this issue, but merely noted: "Certainly the arguments in favor of [Petitioners] position are not overwhelming or clear as day. At the best, from their viewpoint the question is an open one which could be decided either way." Petition, App. 46a. The Court went on to hold that the Temoak Bands had the privilege to decide the issue as part of its litigation strategy, and by implication, Petitioners did not have a right to prove to the Commission that they still held title. *id.*

²As pointed out to the Court of Claims, the issue of extinguishment of title could not be resolved without the submission of evidence and Petitioners supplied that court with a list of exhibits that they would have submitted to the Indian Claims Commission if that tribunal had not refused to accept evidence in any form.

According, Petitioners will not argue the validity of their claim of title here.

The brief submitted by the claims attorney also states: "Realizing that no collusion had ever occurred as this term has always been defined, Petitioners argued that, . . . 'collusion' should include *any* position taken by the duly authorized representative of the Identifiable Group with which the Petitioners disagreed." Brief in Opposition for Respondent Identifiable Group, p. 9. On the contrary, Petitioners offered to prove collusion under *any* definition of that term but the Commission refused them the opportunity to present evidence and, therefore, at the oral argument on collusion, Petitioners were forced by a lack of evidence to adopt, as a secondary position, the theory that 'collusion', for purposes of determining whether the remainder of the Identifiable Group should have access to the Commission, occurs when the exclusive representative joins with the United States in presenting a position contrary to the property interests of the remainder of the Group.

The Petitioners did inform the Commission that they could prove 'collusion' of a more sinister and fraudulent sort if given the opportunity. It should be noted that the Commission not only forbade the introduction of affidavits or other evidence, but did not call for detailed proffers of proof, nor is there any provision in the Rules of the Commission for making the same. Such proffers and allegations that were made were interjected by Petitioners in the exchange of pleadings. At the hearing in the Court of Claims on the motion to dismiss the appeal, the

Court of Claims instructed Counsel for Petitioners to set out the matters they *would have proved had they been given an opportunity* before the Commission. Petitioners responded with a list of proffers including offers to prove specified acts of deception on the part of both Respondents to mislead both the Commission and the Western Shoshone Indians to facilitate the obtaining of a judicial decision defrauding the Western Shoshone People of their rights, that is, specific acts constituting classic 'collusion'. Black, Law Dictionary (4th ed., 1951). The Court of Claims then refused to consider these proffers because they were belatedly interjected on appeal and not supported *by evidence*, Petition, App. 38a., ignoring the fact that Petitioners had no opportunity in the Commission to do so.

The brief of the claims attorney closes with a repetition of the assertion that Petitioners have been unable to affect the conduct of the claim because they are a small minority. This is in direct conflict with Petitioners' proffer of proof in the Indian Claims Commission that the "vast majority of the people comprising the Western Shoshone Identifiable Group now desire to have the issue of the validity of their title determined" before termination of the claims proceeding. See, Decision of the Court of Claims, App. 43a.

Petitioners are seeking Certiorari to have this Court review matters involving procedural issues and due process of law. Petitioners were denied an opportunity to present evidence in support of their allegations and proffers despite repeated requests for an evidentiary hearing

or other procedural means to resolve the conflicting contentions in the pleadings. Under these circumstances, as the Court of Claims more or less acknowledged, the allegations and proffers must be taken as true. Petitioners have alleged and proffered, among other things, that: The Temoak Bands, or more accurately, the claims attorney, has joined with the United States in falsely representing to the Commission that lands belonging to the entire Identifiable Group have been taken by the United States. The majority of the members of the Identifiable Group wish to assert their title to these lands which they will be precluded from doing if the claim proceeds on its present course. The majority of members of the Group have no political or other control over the Temoak Bands or the claims attorney. It is respectfully submitted that the dismissal of Petitioners request to intervene without a full hearing does raise grave issues concerning the taking of property rights belonging to the entire Identifiable Group which this Court should review.

Respectfully submitted,

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